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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

RICHARD E. EARLY, Warden, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

WILLIAM PACKER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM PACKER, Petitioner-Appellant, v. DON HILL, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 00-57051 D.C. No. CV 96-04957 HLH ORDER GRANTING REQUEST FOR CLARIFICATION OF REMAND ORDER AND AMENDING OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
November 8, 2001 – Pasadena, California

Filed January 15, 2002
Amended February 27, 2002
Second Amendment May 6, 2002

Before: Harry Pregerson, Stephen Reinhardt,
and Barry G. Silverman, Circuit Judges.

Opinion by Judge Pregerson;
Dissent by Judge Silverman

SUMMARY

Criminal Law and Procedure/Due Process

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that a state court's actions in telling a known lone-holdout juror who asks to be dismissed that deliberations would have to be started all over with another person if she left; reading a letter written by the jury foreman in open court that describes the juror as a person who is unable to understand the rules and to reason; and indicating that the jury should continue deliberating if it would "help" or allow the jury to "progress" after learning that the breakdown was 11 to one, without ever providing a counter-balancing instruction that the juror should not abandon her conscientiously held views, are unduly coercive and violative of a defendant's due process rights.

Appellant William Packer was charged with several crimes, including second degree murder and attempted murder, and tried in California state court. On May 12, 1992, after over 20 hours of deliberation, and after the jury had returned sealed verdict forms to the court on all but the murder and attempted murder charges, juror Eve Radcliff wrote the judge, asking to be dismissed due to health problems. The judge encouraged Radcliff to remain on the jury, telling her that deliberations would have to be started all over with another person if she left. The next day, May 13, the state court read a letter written by jury foreman Richard Wyke in open court, in which Wyke described Radcliff as a juror who was unable to understand the rules and to reason. The state court then asked about the jury break down, and, learning that the breakdown was 11 to one, indicated that the jury should continue deliberating if it would "help" or allow the jury to "progress," without ever providing a counterbalancing instruction that Radcliff should not abandon her conscientiously held views. During a May 15 conference, the state court learned that Radcliff felt that she had suffered a "public beating" during the May 13 meeting and was feeling pressured by the other members of the jury to join the majority, but the state court again failed to give a counter-balancing instruction that Radcliff should not

surrender her conscientiously held beliefs. The jury convicted Packer of murder, but acquitted him on 10 other counts.

Packer appealed to the California Court of Appeal, which, in an unpublished opinion, simply mentioned three particular incidents in its analysis and considered each of them separately, finding no reversible error in any of the following: (1) the state court's statement to Radcliff, at the May 12 conference in chambers, that deliberations would have to begin anew if Radcliff were excused; (2) the state court's failure to further clarify the law in light of the instructions given on May 12; or (3) the state court's urging the jury to consider the matter further with the view to reaching an agreement on May 13. The California Supreme Court denied Packer's habeas petition without comment.

The federal district court denied Packer's federal habeas corpus petition, but granted a certificate of appealability on claims including that the state trial judge violated his Fourteenth Amendment right to due process by coercing the jury into rendering a guilty verdict.

Packer appealed.

[1] A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or were based on an unreasonable determination of the facts in light of the evidence presented in the state courts. [2] Coercive statements from the judge to the jury result in a denial of the defendant's right to a fair trial and an impartial jury. The applicable legal principles prohibiting juror coercion and the framework of the totality of circumstances test were clearly established.

[3] Because the California Supreme Court denied Packer's habeas petition without comment, the last reasoned decision of a state court had to be considered as the basis of the state court's judgment. The last reasoned decision of the state court, the California Court of Appeal's unpublished opinion, failed to cite to any federal law, much less the

controlling Supreme Court precedents, and failed to apply the totality of the circumstances test. The California Court of Appeal failed to consider the cumulative impact of the three incidents, as well as the cumulative effect of several other coercive judicial actions and statements. [4] Thus, the state court's decision was contrary to clearly established Supreme Court law.

[5] A petitioner is not entitled to habeas relief unless the court both failed to apply clearly established Supreme Court law and reached an erroneous result that warrants the issuance of a writ. [6] Applying Supreme Court law, the Ninth Circuit has found judges' comments to be unduly coercive and violative of defendants' due process rights in circumstances far less coercive than Packer's. [7] The state court's comments on May 13 amounted to a de facto *Allen* charge to the jury, that is, a charge to work towards unanimity and the minority to reexamine its views. The state court's questions to the foreman about whether further deliberations might "help" the jury to "make further progress" could be understood only to suggest approval for the apparent goal of that "progress" -- unanimous verdict. The state court's comments sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict.

[8] The state court's de facto *Allen* charge was particularly coercive because it knew that Radcliff was the lone hold-out juror and Radcliff knew that it knew she was the hold-out juror. Under these circumstances, the state court's questions about whether further deliberations would help the jury to make further progress, though directed to the foreman, could be read by Radcliff as being leveled only at her. If a judge knows the numerical division of a jury and then gives an *Allen* charge, reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them. [9] The state court's conduct during the May 13 conference was also coercive because it humiliated Juror Radcliff unnecessarily. The state court allowed Radcliff's claimed "public beating" to occur by reading the foreman's letter, unabridged, in open court, and without any attempt to lessen the impact of its attacks of Radcliff. [10] Under these circumstances, the state court's failure to give

any counter-balancing instruction on or after May 13 strongly supported the conclusion that Radcliff was coerced to change her vote.

[11] The Supreme Court has instructed that, when the jury break down is 11 to one, the most extreme care and caution are necessary in order that the legal rights of the defendant should be preserved. The state court did not exercise the care and caution required to preserve Packer's due process rights. [12] The state court's decision was erroneous: the judge's actions and statements were, as a whole, and under all of the circumstances, impermissibly coercive and resulted in a denial of Packer's constitutional right to a fair and impartial jury. Because the jury was considering both the murder and attempted murder counts when this coercion occurred, it had to be concluded that the judge's coercion manifestly had a substantial and injurious effect on the jury's verdicts on these counts. The district court's denial of the writ of habeas corpus had to be reversed and the matter remanded with instructions to grant the writ as to Packer's murder and attempted murder convictions.

Judge Silverman dissented, writing that Packer failed to show that the Court of Appeal's decision was contrary to, or involved an unreasonable application of, clearly established federal law.

COUNSEL

Elizabeth Newman, Los Angeles, California (argued) and Monica Knox, La Crescenta, California (brief), for the petitioner-appellant.

Kenneth N. Sokoler, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

ORDER

Petitioner-Appellant William Packer's request for clarification of

the remand order is granted. The opinion filed January 15, 2002 is amended as follows:

1. On the second line from the bottom of slip opinion 644, "returned verdicts" should be replaced with "returned sealed verdict forms to the court."

2. The third and fourth sentences of the first full paragraph of slip opinion page 663 should be deleted and replaced with the following (including footnote 16):

> Because the jury was considering both the murder and attempted murder counts when this coercion occurred, we conclude that the judge's coercion manifestly had a "substantial and injurious effect" on the jury's verdicts on these counts. *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710, 123 L.Ed.2d 353.[16] We therefore reverse the district court's denial of the writ of habeas corpus and remand with instructions to grant the writ as to Packer's murder and attempted murder convictions.

3. On slip opinion page 665, the remainder of the majority opinion below the heading "Conclusion" should be deleted and replaced with the following:

> While we agree with the district court's rejection of Packer's leg brace claim, we reverse its decision to deny the writ of habeas corpus with respect to the murder and attempted murder convictions, because we uphold Packer's juror coercion claim as to those counts. As to the remaining counts on which Packer was convicted, we affirm the denial of the writ. Accordingly, we remand to the district court for the granting of an appropriate writ of habeas corpus on the murder and attempted murder counts.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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16. We disagree with the prosecution's contention that habeas relief should only extend to the murder charge because the jury reached a verdict on the attempted murder charge before the juror coercion began. To the contrary, Foreman Wkye told Judge Phelps and counsel that the jury was continuing to deliberate about the attempted murder charge (count 2) on the afternoon of Friday, May 15. *See* ER 42, 110-11. We also disagree with Packer's contention that habeas relief should extend to *all* of the charges he was convicted of committing because none of the verdicts was final when the juror coercion occurred. Sealed verdict forms on all but the murder and attempted murder charges were submitted to the court *before* the juror coercion occurred, and there is no indication in the record that any of the jurors wavered in their votes on these charges.

OPINION

PREGERSON, Circuit Judge:

In 1992, a California state jury convicted William Packer ("Packer") of one count of second degree murder, one count of attempted murder, two counts of attempted robbery, two counts of assault with a deadly weapon, and one count of assault with a firearm. The jury acquitted Packer on ten other counts.

[1] After exhausting his claims in state court,[1] Packer timely filed a federal habeas corpus petition. Magistrate Judge Margaret Nagle prepared a report ("Report") recommending that Packer's petition be denied. District Judge Harry L. Hupp adopted Magistrate Judge Nagle's Report, but granted Packer a certificate of appealability on two of Packer's claims: that the state trial judge violated his Fourteenth Amendment right to due process by coercing the jury into rendering a guilty verdict, and that the state trial judge violated Packer's Sixth and

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1. See Section II.A, *infra*.

Fourteenth Amendment rights by ordering him to wear a concealed leg brace at trial that caused Packer pain and prevented him from straightening his leg. Because we hold for Packer on the first claim, we reverse the district court and remand with instructions to grant the writ of habeas corpus.[2]

I. Background

A. Juror Coercion Claim

On May 12, 1992, after over twenty hours of deliberation, and after the jury had returned sealed verdict forms to the court on all but the murder and attempted murder charges, Juror Eve Radcliff ("Juror Radcliff") wrote the judge, asking to be dismissed "[d]ue to health problems." Judge Phelps and Juror Radcliff then met outside the presence of the defendant and the attorneys. The following conversation ensued:

Radcliff: Well, since I wrote that letter I have been thinking over things a little bit and I think maybe I should – see, these are some very serious charges.

Judge: They certainly are. I don't want to know how they been voted on. I don't want to know how they been voted on.

Radcliff: Certainly not, your Honor. But I can't--because of the seriousness of the charges, I can't make snap decisions. And just as in your instructions you stated to us certain things to practice in deliberations. I was beginning to feel a little burned out.

Judge: We all are.

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2. We review a district court's decision to dismiss a petition for writ of habeas corpus de novo. *Miles v. Prunty,* 187 F.3d 1104, 1105 (9th Cir.1999).

Radcliff: Yeah.

. . . . .—

Judge: [Y]ou are going to take off Thursday and we're going to allow that. So you think you can hold out just a little bit longer?

Radcliff: Yes.

Judge: I really appreciate it. *Otherwise, they have to start deliberations all over again with another person.*[3]

Radcliff: That's what I understand.

(Emphasis supplied).

The next day, May 13, Judge Phelps received a note from the jury foreman, Richard Wyke ("Foreman Wyke"). Foreman Wyke wrote:

> I believe we have reached a state where we can no longer deliberate. One juror, Eve Radcliff, does not appear to be able to understand the rules as given by you. I have been approached by nearly all my fellow jurors questioning her ability to understand the rules and her ability to reason. I feel

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3. California law allows for the substitution of an alternate juror after a verdict has been reached on some but not all of the counts, provided that the trial court instructs the panel to begin deliberations anew on the remaining counts. *People v. Aikens,* 207 Cal.App.3d 209, 211, 254 Cal.Rptr. 30 (1988). A juror can be substituted if he or she becomes sick, or for other "good cause," including the juror's inability to render a fair and unbiased verdict. *People v. Delamora,* 48 Cal.App.4th 1850, 1855, 56 Cal.Rptr.2d 382 (1996) (jurors cannot be excused if they are not ill or otherwise unable to perform their duties); *People v. Farris,* 66 Cal.App.3d 376, 386, 136 Cal.Rptr. 45 (1977) ("good cause" is shown if the juror is unable to "render a fair and unbiased decision").

> that if we continue we will end up as a hung jury, not based on facts and evidence, but one person's inability to reason or desire to be unreasonable.

Judge Phelps read the note aloud in open court, in the presence of the attorneys, the defendant, and all of the jurors. Judge Phelps then asked Foreman Wyke whether the jury was deliberating. Wyke responded that they were "just having the same conversation over the same issue time and time again." Judge Phelps asked whether the dispute was factual. Wyke responded that "[i]t basically comes down to there's a point where the rules of law, or as has been described, we just have a total difference of opinion over. I think we have a state of denial almost where its just not happening." Judge Phelps then explained:

> The juror has a right to do that, as you all know. They have a right to disagree with everybody else. But they do not have a right to not deliberate. They must deliberate and follow the rules and laws as I state it to them.

After more discussion, Judge Phelps said:

Judge: The next question I have for you, I just want two numbers and that's all. I want to know nothing else but two numbers. I'll ask you this. In your last ballot what was the ballot? *What was the count? Don't tell me for or against, just numbers.*

Wyke: I know. The last one was 11 to 1.

Judge: 11 to 1.

Judge: The one before that was 10 and 2.

Judge: *Do you think that further deliberations might help.* I think you're off tomorrow, are you not?

Wyke: Yes.

Judge: *Do you think if you take off now and come back Friday you might be able to make further progress?....*

Wyke: It comes down to interpreting.

Judge: It's been a long time for you people.

Wyke: Yes. We are getting tired of each other. It comes down to interpreting the laws as given to us, and if one person's interpretation is inflexible in their view, I don't know that it will do us any good.

Radcliff: Or different.

Judge: *Has the person been deliberating?* And discussing–

Wyke: *Yes. I'm not questioning that.* We might give it a shot and come back Friday morning. If it continues we are going to be hung.

Judge: If you do that, then *what you're saying to me is there's a possibility you could reach a verdict, but let's take a little time off. That might help? I don't think it would hurt.*

(Emphasis supplied). Jurors then began asking questions about the deliberative process and the following conversation ensued:

Radcliff: Was there something regarding morals in the instructions that you gave us?

Judge: I don't think so. No.

Radcliff: You cannot give us an interpretation of the law.

Judge: No. I cannot do that.

Radcliff: It's up to us individually to interpret the law and apply it.

Judge: What you do is--like I think what the instructions were--you apply the facts to the law and you arrive at a decision. *The law is right there,* and I think elements of the law was given to you in those instructions. They do this or not do this? Was it proven beyond a reasonable doubt? This element, this element, this element? If they did and you find unanimously they did that, you must follow the law and find them either guilty or not guilty of that charge.

(Emphasis supplied). At this point, defense counsel objected and, in a side bar, said that Judge Phelps was misstating the instructions and improperly "instructing the jury ... as to their manner of deliberation." Defense counsel then asked that Judge Phelps instruct the jury only that they are "to follow the law as I give it to you and to refrain from explaining further what that instruction might mean in practice." The prosecutor offered that Juror Radcliff's comments reflected that she was not going to follow the law. Judge Phelps overruled defense counsel's objection and instructed the jury as follows:

> Ladies and Gentlemen, the only thing I'm going to tell you right now is; once again, I told you, you'll look up in the instructions paraphrasing it, I think I'm using the correct words: you're the sole judges of the facts. You determine the facts. You then apply the law to those facts as I state it to you, and you must accept and follow the law. You can't make up your own law. You must accept and follow the law as I state it to you.

Judge Phelps then excused the jury until Friday.

On Friday, May 15, the jury continued its deliberations. That afternoon, Juror Radcliff submitted a second letter to Judge Phelps that read:

> Due to the public beating in the jury box I experienced Wednesday, and the beatings I experience in the deliberation room from other jurors, I am again submitting a request to be dismissed from continuing on this jury.
>
> I now am struggling with a feeling of distrust and disrespect from the other jurors, borne out of the letter that was submitted to you, regarding my so-called "refusal" to accept or agree with the other jurors' thinking.
>
> I did not know *anything* about the letter that the other jurors/foreman submitted to you regarding me. As I result I find it difficult to continue in deliberations.
>
> Respectfully submitted, Eve Radcliff
>
> P.S. Though the proceedings have improved in their nature, I have reached a point of anger, and I don't believe I can be objective.

(Emphasis in original). After reading Juror Radcliff's second letter to the attorneys in chambers, defense counsel stated that Radcliff was "being driven off the jury." Judge Phelps informed counsel that he was going to call Juror Radcliff into chambers. Defense counsel objected to Judge Phelps's decision to call Juror Radcliff into chambers.[4] Defense counsel said:

> Let me -- just so I can get my record clear. Let me say that I-- also *I object to this procedure* . I feel what's happening is that *Miss Radcliff is being singled out. And it's more pressure on her to either change her vote or be excused. And I think this is the process that causes that.* This causes somebody -- especially when she is going to come into chambers with just the court and counsel, puts her in a very difficult position.

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4. Defense counsel additionally argued that Packer would be denied a jury drawn from a fair cross-section of the community were Juror Radcliff excused because she was one of two black people on the jury.

When Juror Radcliff was brought into chambers, she said a "personality ething" was affecting deliberations. As she explained:

> *I didn't know about the letter that they submitted to you until like a minute and a half before we went out in the box.* And then when it was read, it sounded to me like they wanted--the intent was for me--they were upset because I didn't--I wasn't--okay. I think if I recall correctly something like, refuses to understand our thinking, or refuses to accept our line of reasoning, or refuses to accept the law. I think that's what they said or something like that. And I took that to mean that things weren't going the way that they were supposed to go, because at that point I was giving them responses, you know. *We were deliberating, I thought, but they felt that they weren't getting from me the type of responses that they wanted* because I didn't see what they were saying....

(Emphasis supplied). After Judge Phelps asked Juror Radcliff whether she was continuing to deliberate, she explained that she was trying, but said "[i]t's not to their satisfaction, that's what part of the problem is." Judge Phelps said: "Two weeks is a long, long time, it is, and I appreciate that. Okay. I think I understand. Thank you very much." Juror Radcliff returned to the jury room.

Judge Phelps then called in Foreman Wyke to meet with him and the attorneys. Judge Phelps asked Wyke: "is the position that you have reached in your deliberations that you can't go any further or do you think that--how do you feel about it?" Wyke explained their current deliberations process and repeatedly confirmed that Juror Radcliff was continuing to deliberate. Wyke was excused from Judge Phelps's chambers, and the jury continued to deliberate.

At the end of that day the jury was excused until Tuesday, May 19. On the morning of May 19, Juror Radcliff wrote Judge Phelps again, "requesting to speak with [the Judge] alone, in the presence of a court reporter only, if possible." Judge Phelps did not meet with Juror

Radcliff.[5] The jury rendered a guilty verdict on the attempted murder charge late in the afternoon of May 19, and was then excused for the day. Early in the morning of May 20, the jury rendered a guilty verdict on the murder charge.

B. Leg Brace Claim

The day after the jury was sworn, the Sheriff's Department requested that Packer wear a leg brace underneath his pants during trial. The leg brace locked in a straight position when the wearer stood, was worn under one pant leg, and attached with velcro to the thigh and calf.

At the Sheriff's Department's request and over defense counsel's objection, Judge Phelps held an in camera hearing to review the evidence supporting the request. During the in camera hearing, Sergeant Fogerty and two Deputies, Leibrich and McCarthy, explained that they sought the leg brace because James "Doc" Holliday ("Holliday"), one of Packer's prospective witnesses, was a "very high security risk." Sergeant Fogerty explained, under oath:

> I received some information from Deputy Chaffin from the Security Unit yesterday that our Special Investigations Bureau has information that somebody connected with Holliday has said that when he gets to L.A., that stuff is going to happen. He's got nothing to lose. He wants out. He's a high escape risk.

Judge Phelps asked how this information applied to Packer. Deputy McCarthy explained, in an unsworn statement, that:

> James Holliday's wife has had communications with Packer, and that the information is that the communication between the two of them was: "I'll see you in Los Angeles, and that

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5. In another handwriting, at the bottom of the note, was written: "request cancelled at 9:25 a.m." It is unclear from the record who canceled the request.

that's when its going to happen." Now, what we're trying to do now is establish exactly who the source is of that information, and that's the part that we don't want to disclose in court.[6]

Finally, the Sheriff's Department reported--during the in camera hearing and, at Judge Phelps's request, in open court--that they also sought a leg brace because Packer had a "special handling card" at the county jail, which was described as "a description of an inmate's possible potential problems of some sort," and because Packer had caused "some major disturbances" including "gang fights" while in custody.

Defense counsel countered that the only prison disturbance Packer had been involved in was in 1982, while Packer was in custody on another case, and that Packer was ultimately acquitted of charges arising out of that disturbance. Packer also testified in opposition to the use of the leg brace. Packer challenged the Sheriff's Department's characterization of his conduct while in custody and testified that, in his experience, restraints "definitely inhibit[] one's ability to function, to communicate ... [, and] to concentrate."

Judge Phelps ordered Packer to wear the leg brace during trial. Judge Phelps found that the leg brace was necessary based upon testimony received at the in camera hearing and the testimony in open court, and concluded that the leg brace would not compromise the integrity of the proceedings. Judge Phelps explained:

> [T]he leg brace will not be visible to the jury; will not impede communications with his lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant; and would not be -- he will be seated before the jury enters and remain seated until the jury leaves. If the defendant chooses to take the stand, he'll be on the stand

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6. Deputy McCarthy's information is contradicted by Packer's undisputed declaration that Holliday's wife was in federal custody at the time the alleged "communication" occurred between Packer and Holliday's wife.

> before the jury enters and remain on the stand until after the jury leaves.

As a result of the leg brace, Packer was required to remain seated at all times and was, therefore, unable to stand when the judge and jury entered the courtroom. Holliday was never called as a witness.

II. Discussion

A. Exhaustion

The State contends that Packer failed to exhaust his claims in state court. However, Packer's Petition for Review, though succinct, " 'fairly presented' ... the 'substance' of his federal habeas corpus claim[s]" to the California Supreme Court. *Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (quoting *Picard v. Connor,* 404 U.S. 270, 277-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)). Thus, the State's argument is without merit.

B. Merits

1. Packer's Fourteenth Amendment due process rights were violated because there is a strong likelihood that Judge Phelps's coercive statements and actions during the jury's deliberations caused Juror Radcliff to change her vote.

[1] A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or were "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts.[7] 28 U.S.C.

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7. Packer's petition is governed by the standards of 28 U.S.C § 2254 because his habeas petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act, the statute which enacted the current standards governing the granting of the writ of

§ 2254(d). Under the "contrary to" clause, a state court's decision is contrary to Federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard,* 234 F.3d 1072, 1077 (9th Cir.2000); *see also Williams v. Taylor,* 529 U.S. 362, 405-07, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Lajoie v. Thompson,* 217 F.3d 663, 667 (9th Cir.2000); *Tran v. Lindsey,* 212 F.3d 1143, 1150 (9th Cir.2000).

[2] Here, Packer's juror coercion claim is governed by Federal law first set forth in *Jenkins v. United States,* 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) and expanded upon in *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).[8/] Coercive statements from the judge to the jury result in a denial of the defendant's right to a fair trial and an impartial jury. *Lowenfield,* 484 U.S. at 241, 108 S.Ct. 546. In order to determine whether the judge's comments were impermissibly coercive, the court must evaluate them "in [their] context and under all the circumstances." *Id.* at 237, 108 S.Ct. 546 (quoting *Jenkins,* 380 U.S. at 446, 85 S.Ct. 1059). The fact that Supreme Court law sets forth a fact- intensive inquiry to determine the extent of the statements' coerciveness "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams,* 529 U.S. at 391, 120 S.Ct. 1495 (stating this in regard to *Strickland*'s case-by-case approach); *see also Fisher v. Roe,* 263 F.3d 906, 914 (9th Cir.2001) (holding Supreme Court law "clearly established" because Supreme Court "set forth a working constitutional standard by which to evaluate [the claim at issue]"). Therefore, the applicable legal principles prohibiting juror coercion and the framework of the totality of circumstances test were "clearly established" for purposes of § 2254(d)(1).

[3] Because the California Supreme Court denied petitioner's

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habeas corpus.

8. *See also Brasfield v. United States*, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926); *Burton v. United States,* 196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482 (1905).

habeas petition without comment, we look to the last reasoned decision of a state court as the basis of the state court's judgment. *Shackleford v. Hubbard,* 234 F.3d 1072, 1079 n. 2 (9th Cir.2000); *see also Ylst v. Nunnemaker,* 501 U.S. 797, 803-04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, the last reasoned decision of the state court, the California Court of Appeal's unpublished opinion,[9/] failed to cite to any federal law, much less the controlling Supreme Court precedents. Moreover, the court failed to apply the totality of the circumstances test as required by *Lowenfield* and *Jenkins.* Rather than evaluating the totality of the circumstances under which the judge's actions and comments occurred, as required by *Lowenfield* and *Jenkins,* the California Court of Appeal simply mentioned three particular incidents in its analysis and considered each of them separately, finding no reversible error in any of the following: (1) Judge Phelps's statement to Juror Radcliff, at the May 12 conference in chambers, "that deliberations would have to begin anew if [Radcliff] were excused"; (2) Judge Phelps's failure to further clarify the law in light of the instructions given on May 12; or (3) Judge Phelps's "urging the jury to consider the matter further with the view to reaching an agreement" on May 13. The California Court of Appeal failed to consider the cumulative impact of these three incidents, as well as the cumulative effect of several other coercive judicial actions and statements in this case.[10/]

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9. *See People v. Jordan, et al.*, No. A958712 (Ca. Ct.App. filed Apr. 13 1995).

10. Significantly, the court does not even mention in its analysis that Judge Phelps inquired about the breakdown of the jury and, after learning that it was first ten to two and then eleven to one, directed the jury to return to its deliberations. *See Lowenfield,* 484 U.S. at 239- 41, 108 S.Ct. 546; *Brasfield v. United States,* 272 U.S. 448, 449, 47 S.Ct. 135, 71 L.Ed. 345 (1926); *Burton v. United States,* 196 U.S. 283, 307, 25 S.Ct. 243, 49 L.Ed. 482 (1905). The state court also failed to consider the following critical facts: (1) Judge Phelps knew that Radcliff was the sole dissenting juror prior to his instructing the jury to keep deliberating; and (2) Judge Phelps's action of reading the note from Foreman Wyke out loud in front of the jury and identifying juror

[4] in addition to failing to apply controlling Supreme Court law, the state court made an explicit statement of law that is contrary to Supreme Court precedent. The California Court of Appeal stated that "there is nothing improper in urging the jury to consider [a case] further with the view to reaching an agreement as long as the language used does not coerce a particular type of verdict." However, the Supreme Court has held a judge's instructions to be coercive simply because it coerced *a* verdict. The error lies in simply pressuring the jurors to arrive at *some* verdict, not in urging the jury to reach a particular verdict. *See Gypsum Co.*, 438 U.S. at 461, 98 S.Ct. 2864 (holding reversible error when judge implied that he wanted the jury to reach a verdict "one way or the other"); *Jenkins*, 380 U.S. at 446, 85 S.Ct. 1059 (holding reversible error when judge told the jury, "you have got to reach a decision in this case"). Thus, the state court's decision was contrary to clearly established Supreme Court law, not only because it failed to apply the governing law, but also because its partial rationale directly contradicted Supreme Court precedent.[11] *See Campbell v. Rice*, 265 F.3d 878, 889- 90 (9th Cir.2001); *Lockhart v. Terhune*, 250 F.3d 1223, 1229, 1232 (9th Cir.2001); *Shackleford*, 234 F.3d at 1078; *McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir.2000).

[5] However, the petitioner is not entitled to habeas relief unless the California Court of Appeal both failed to apply clearly established Supreme Court law and reached an erroneous result that warrants the issuance of a writ. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Given our conclusion that the state court failed to apply clearly established Federal law, we must now determine whether its decision constituted error and if so whether the error had a substantial or injurious effect on the verdict. *See id.* Our first task is to look to Supreme Court case law and our own cases (and in appropriate instances those of other circuits), and apply them in the

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Radcliff by name.

11. In fact, in this case the state court failed even to consider whether a federal constitutional violation occurred, as the petitioner had urged; instead it addressed only issues of state law.

ordinary course.[12] In the case before us, our analysis of the applicable federal law compels us to conclude that the judge's statements were impermissibly coercive.

[6] Applying Supreme Court law, we have found judges' comments to be unduly coercive and violative of defendants' due process rights in circumstances far less coercive than those present here. In *Jiminez v. Myers*, 40 F.3d 976 (9th Cir.1993), the trial judge met twice with a deadlocked jury. *Id.* at 978-79. In the first meeting, the judge asked how many votes had been taken, how the breakdown of the votes began and ended, and whether there had been any "movement." *Id.* at 979. After the foreman replied that there was "movement," the judge returned the jury to its deliberations. *Id.* After further deliberations, the jury met again with the judge and informed him that it was divided eleven to one. *Id.* The judge noted that there had been "substantial movement" and sent the jury back to deliberate. *Id.* Less than two hours later, the jury returned with a unanimous verdict. *Id.*

We concluded in *Jiminez* that the trial court's comments and conduct "amounted to giving the jury a de facto *Allen* charge."[13] *Id.* at 980. In support of this conclusion, we observed:

> In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, *the judge's instruction to continue deliberating until the end of the day*

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12. Unlike in those post-ADEPA § 2254 cases in which the state court *applied* the controlling federal law but the petitioner urges that the application was unreasonable, here the state court *failed to apply* the controlling Federal law, and so the result it reached need not be clearly erroneous in order for a writ to issue; the fact that the result is erroneous is sufficient, so long as the *Brecht* standard is met.

13. An *Allen* charge "instructs the jurors to work towards unanimity and the minority to reexamine its views." *Jiminez*, 40 F.3d at 980.

> *sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict,* and the hold-out juror was to cooperate in the movement toward unanimity.

Id. at 981 (emphasis supplied). Under these circumstances, we held, the judge's "failure to counter-balance the implication of its questions and comments by instructing the hold-out juror not to surrender his or her sincere convictions strongly supports the conclusion that the jury was impermissibly coerced to render a unanimous verdict." *Id.* (citation omitted).

[7] Judge Phelps's comments on May 13 amount to a "de facto *Allen* charge." *Id.* Judge Phelps asked about the jury's breakdown, learned that it had been divided ten to two but was currently divided eleven to one, and said that he would send the jurors back to deliberate if the foreman thought that "further deliberations might help" or if the jury might be able "to make further progress." Like the trial judge's approving comments about "movement" in *Jiminez,* Judge Phelps's questions to Foreman Wyke about whether further deliberations might "help" the jury to "make further progress" can only be understood to suggest approval for the apparent goal of that "progress"--a unanimous verdict. As in *Jiminez,* Judge Phelps's comments sent "a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict." *Id.*

[8] Judge Phelps's "de facto *Allen* charge" was particularly coercive because he knew that Juror Radcliff was the lone hold-out juror and Radcliff knew that he knew she was the hold-out juror. When Judge Phelps made his comments, he had read Wyke's letter in open court and learned from Foreman Wyke that the jury breakdown was eleven to one. Under these circumstances, Judge Phelps's questions about whether further deliberations would "help" the jury to "make further progress," though directed to Foreman Wyke, "could only be read by [Radcliff] as being leveled at [her]." *United States v. Sae-Chua,* 725 F.2d 530, 532 (9th Cir.1984).

> [S]he could hardly escape reasoning that the judge was not likely to believe that [s]he could persuade the opposing eleven to adopt [her] position--a position the foreman had felt to be improperly taken; and that *[s]he, individually, was being urged by the judge to reconsider [her] vote.*

Id. (emphasis supplied). We have held that if a judge knows the numerical division of a jury and then gives an *Allen* charge, "reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them--that is, if the judge knew which jurors were the holdouts and each holdout juror knew that the judge knew he was a holdout." *United States v. Ajiboye,* 961 F.2d 892, 894 (9th Cir.1992). Even though Judge Phelps did not actually give an *Allen* charge, his comments had the same meaning and effect, and therefore, the comparable circumstances present here merit the same findings of coercion and error: "[s]o long as the defendant has offered facts that fairly support an inference that jurors who did not agree with the majority felt pressure from the court to give up their conscientiously held beliefs in order to secure a verdict, we must proceed to the *Allen* charge analysis." *Weaver v. Thompson,* 197 F.3d 359, 365 (9th Cir.1999).

[9] Judge Phelps's conduct during the May 13 conference was also coercive because it humiliated Juror Radcliff unnecessarily. Judge Phelps read Foreman Wyke's letter in open court, including its references to Juror Radcliff as a juror who "does not appear to be able to understand the rules," and about whom Wyke had been "approached by nearly all [his] fellow jurors questioning her ability to understand the rules and her ability to reason." As is evidenced by Juror Radcliff's May 15 note and her comments during the meeting in chambers with Judge Phelps and the attorneys, hearing Wyke's letter felt like a "public beating" that was intended to make her change her vote. Judge Phelps allowed this "public beating" to occur by reading Wyke's letter, unabridged, in open court, and without any attempt to lessen the impact of its ad hominem attacks of Juror Radcliff.

[10] Under these circumstances, Judge Phelps's failure to give any counter- balancing instruction on or after May 13 strongly supports the

conclusion that Juror Radcliff was coerced to change her vote.[14] Although Judge Phelps commented that "the juror" had a right "to disagree with everybody else" at the beginning of the conference on May 13, he immediately countered that she did not "have a right to not deliberate," told Radcliff that "[t]he law is right there" and she must "follow the law," and instructed the jurors that they "must accept and follow the law" and "can't make up [their] own law." Judge Phelps never reminded Radcliff or the other jurors of their obligation not to surrender their conscientiously held beliefs. Judge Phelps again failed to give a counter-balancing instruction on May 15, when he met with Juror Radcliff and the lawyers. A counter-balancing instruction would have been particularly appropriate under the circumstances of the meeting which, as defense counsel observed, "put[] her in a very difficult position," and was "more pressure on her to either change her vote or be excused."[15] Given the feelings of humiliation and pressure that Juror Radcliff expressed during the May 15 conference, a counter-balancing instruction would undoubtedly have been welcomed.

[11] The Supreme Court has instructed that, where the jury break down is eleven to one, "the most extreme care and caution [are] necessary in order that the legal rights of the defendant should be preserved." *Burton v. United States,* 196 U.S. 283, 307, 25 S.Ct. 243, 49

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14. Judge Phelps did give a counter-balancing instruction in the instructions he gave *before* the jury began its deliberations.

15. The dissent contends that because defense counsel did not object to the judge's allowing the deliberations to continue with Juror Radcliff on the jury *after* the May 15 meeting, Packer should not now be able to argue that Juror Radcliff was coerced. However, there is no precedent that suggests that a defense attorney's desire to have a particular juror remain on the jury renders a judge's coercive statements to the jury harmless. Indeed, such a desire may make the need for a counter-balancing instruction even greater. Here, although defense counsel did argue that Radcliff should remain on the jury, he also urged that she not be pressured to change her vote and that the judge not meet privately with her in his chambers.

L.Ed. 482 (1905). Judge Phelps did not exercise the care and caution required to preserve Packer's due process rights. One day after Judge Phelps had encouraged Juror Radcliff to remain on the jury despite her request to be excused, Judge Phelps read Foreman Wyke's letter in open court, in which Wyke described Radcliff as a juror who was unable to "understand the rules" and "reason." Judge Phelps then asked about the jury break down, and, learning that the breakdown was eleven to one, indicated that the jury should continue deliberating if it would "help" or allow the jury to "progress" without ever providing a counter-balancing instruction that Juror Radcliff should not abandon her conscientiously held views. During the May 15 conference, Judge Phelps learned that Juror Radcliff felt that she had been "beaten" during the May 13 meeting and was feeling pressured by the other members of the jury to join the majority, but Judge Phelps again failed to give a counter-balancing instruction that Radcliff should not surrender her conscientiously held beliefs.

[12] In sum, the California Court of Appeal's decision was "contrary to ... clearly established Federal law" because it failed to apply clearly established Supreme Court law. 28 U.S.C. § 2254(d). After examining the relevant federal juror coercion cases, we hold that the state court's decision was erroneous: the judge's actions and statements were, as a whole, and under all of the circumstances, impermissibly coercive and resulted in a denial of Packer's constitutional right to a fair and impartial jury. Because the jury was considering both the murder and attempted murder counts when this coercion occurred, we conclude that the judge's coercion manifestly had a "substantial and injurious effect" on the jury's verdicts on these counts. *Brecht,* 507 U.S. at 637, 113 S.Ct. 1710, 123 L.Ed.2d 353.[16] We therefore reverse the district

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16. We disagree with the prosecution's contention that habeas relief should only extend to the murder charge because the jury reached a verdict on the attempted murder charge before the juror coercion began. To the contrary, Foreman Wkye told Judge Phelps and counsel that the jury was continuing to deliberate about the attempted murder charge (count 2) on the afternoon of Friday, May 15. *See* ER 42, 110-11. We also disagree with Packer's contention that habeas relief should

court's denial of the writ of habeas corpus and remand with instructions to grant the writ as to Packer's murder and attempted murder convictions.

2. Although Packer's due process rights were violated when Judge Phelps ordered Packer to wear a leg brace during trial, Packer is not entitled to relief because the error was harmless.

Although the Due Process clause of the Fourteenth Amendment generally protects a defendant's right to appear at trial without shackles or other physical restraints, a trial judge's decision to restrain a defendant at trial is not unconstitutional per se. *Illinois v. Allen,* 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The Supreme Court has held that in order to maintain the proper "dignity, order, and decorum" during court proceedings, "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id.* at 343, 90 S.Ct. 1057. Because of their potential for prejudice, however, due process requires that restraints be used only as a "last resort." *Id.* at 344, 90 S.Ct. 1057.

In this case, the only evidence supporting the Sheriff Department's application for a leg brace was unsworn, hearsay testimony regarding a potential witness's plan to do "stuff" while in Los Angeles. None of the evidence submitted at the hearing reflected that Packer was going to participate in the "stuff," and none of the evidence established that the "stuff" contemplated would cause Packer to engage in disruptive courtroom behavior or an attempt to escape. Moreover, Packer had never attempted escape and had, for the most part, a clean disciplinary history while in custody. There were, in sum, no persuasive reasons why it was necessary to resort to restraints.

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extend to *all* of the charges he was convicted of committing because none of the verdicts was final when the juror coercion occurred. Sealed verdict forms on all but the murder and attempted murder charges were submitted to the court *before* the juror coercion occurred, and there is no indication in the record that any of the jurors wavered in their votes on these charges.

In addition, Judge Phelps never considered any alternatives less restrictive than the leg brace. In light of the fact that the evidence reflected only that "stuff" might happen if and when Holliday appeared as a witness, it would have been sensible to wait until Holliday was, in fact, called as a witness to impose any physical restraint. It would have been more sensible still to impose a physical restraint on Holliday, who was the flight risk, instead of Packer. Particularly in light of the fact that Holliday was never called as a witness at Packer's trial, Judge Phelps's action was unwarranted. Clearly, in this case the imposition of physical restraints was not a "last resort."

Nevertheless, Packer is not entitled to habeas relief on this claim because he cannot show prejudice resulting from the leg brace. *Duckett v. Godinez,* 67 F.3d 734 (9th Cir.1995); *Castillo v. Stainer,* 983 F.2d 145, 149 (9th Cir.1992). None of the jurors who were interviewed after trial remembered seeing the leg brace on Packer. *See Castillo,* 983 F.2d at 149 (shackling was harmless error because defendant wore waist chain that could not be seen by the jury); *Jones,* 899 F.2d at 885 (no prejudice when defendant's handcuffs were hidden by his shirt or jacket at all times). Although Packer argues that the leg brace impeded his ability to participate in his defense, he has not shown that his alleged inability to contribute to his defense had a " 'substantial and injurious effect or influence in determining the verdict.' " *Brecht,* 507 U.S. at 623, 113 S.Ct. 1710 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). In sum, the decision to order Packer to wear a leg brace did not deny him a fair trial under the circumstances.

CONCLUSION

While we agree with the district court's rejection of Packer's leg brace claim, we reverse its decision to deny the writ of habeas corpus with respect to the murder and attempted murder convictions, because we uphold Packer's juror coercion claim as to those counts. As to the remaining counts on which Packer was convicted, we affirm the denial of the writ. Accordingly, we remand to the district court for the granting of an appropriate writ of habeas corpus on the murder and attempted murder counts.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

I respectfully dissent over two points.

I. The Jury Issue

The majority glosses over a key fact concerning the jury problem: Defense counsel was aware of everything the judge had said and done, but instead of moving for a mistrial, defense counsel implored the judge to keep Radcliff on the jury and stated that he had no objection to allowing the deliberations to continue.

On the afternoon of May 15, the judge informed counsel of Radcliff's "public beating" note. Defense counsel responded:

> Well, I think that she's being driven off the jury. And what she's saying here is she is angry and upset and that she's getting treated badly by the other jurors. *That doesn't make her a person that's unable to continue.* That just means that she doesn't like it.

(Emphasis added.)

The judge then stated his intention to interview Radcliff in chambers in the presence of both counsel. Before the interview began, defense counsel made it clear to the judge that he did not want to lose Radcliff as a juror:

> [DEFENSE COUNSEL]: This would be the--if you decided to excuse her, this would be the second black juror and a woman, and a black woman. I think that we would then be deprived of a fair cross-section of the community and I would

> ask for a mistrial.
>
> THE COURT: You mean based on the fact that there is a black person being dismissed?
>
> [DEFENSE COUNSEL]: Yes.

Just before the interview commenced, defense counsel objected to the procedure of singling out Radcliff for interview on the grounds that the procedure would pressure her to "change her vote or be excused." However, *after* Radcliff was questioned and had left the room, defense counsel made only one statement: "Sounded like an intelligent, articulate person who has a difference of an opinion." He no longer voiced any objection to the procedure, made no mention of any coercion or pressure, and made no motion for mistrial.

After foreman Wyke was interviewed and left chambers, the judge announced his decision to "let them continue to deliberate." The judge also briefly discussed a minor scheduling issue. After stating his rulings, the judge said to counsel, "Any objection to that?" Defense counsel replied, "No, I don't."

A party is not permitted to wait-and-see what a verdict will be, and then upon receiving an unfavorable result, raise for the first time a problem with the jury of which he was previously aware. As the First Circuit put it, "We will not allow counsel to stand by quietly and gamble on a favorable verdict, only to complain when it turns out to be otherwise." *United States v. Morris,* 977 F.2d 677, 686 (1st Cir.1992). Defense counsel knew full well how the judge had responded to the Radcliff situation, but defense counsel wanted *this* jury to continue its deliberations notwithstanding whatever the judge did, or could have done better. Had the judge declared a mistrial sua sponte based on either Radcliff's statements or the judge's own statements, the petitioner would have had a legitimate right to complain that a mistrial violated his right against Double Jeopardy. *See United States v. Shaw,* 829 F.2d 714, 719 (9th Cir.1987) (citing *Arizona v. Washington,* 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Defense counsel's faith in this jury

was not altogether misplaced: The jury acquitted the petitioner of 10 of the 17 counts.

Perhaps the reason that defense counsel did not seek a mistrial is that he recognized at the time, as the California Court of Appeal and the district court did later, that the judge's comments did no harm. *After* the coercion supposedly began, the jurors deliberated for at least an *additional* eight and a half hours. This fact strongly suggests the absence of coercion. We have held that claims of jury coercion were rebutted by much shorter periods of continued deliberations following supposed coercion. *See., e.g., United States v. Daas,* 198 F.3d 1167, 1180 (9th Cir.1999) (one hour); *United States v. Plunk,* 153 F.3d 1011, 1027 *amended on denial of reh'g,*161 F.3d 1195 (9th Cir.1998), (roughly two hours); *United States v. Easter,* 66 F.3d 1018, 1023 (9th Cir.1995) (two and a half hours); *United States v. Lorenzo,* 43 F.3d 1303, 1307, n. 3(9th Cir.1995) (five and one-half hours); *United States v. Bonam,* 772 F.2d 1449, 1451 (9th Cir.1985) (90 minutes); *United States v. Beattie,* 613 F.2d 762, 766 (9th Cir.1980) (three and a half hours).

In this case, the California Court of Appeal held that "the comments made and not made by the court to the jury did not coerce a particular verdict or deny Packer any constitutional rights." The petitioner has failed to demonstrate that this decision was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, as required for relief under 28 U.S.C. § 2254(d)(1).

II. The Leg Brace

I agree with the majority that the petitioner has failed to show that he was prejudiced by having to wear a leg brace under his clothing. However, I cannot agree with the portion of the opinion that says that the petitioner's rights were violated by his having to wear the brace to begin with. A trial judge has wide discretion to decide whether public safety considerations warrant increased security measures. *See Morgan v. Bunnell,* 24 F.3d 49, 51 (9th Cir.1994). The California Court of Appeal reviewed the trial court's hearing on the matter and held:

> The record at the hearing ... established Packer's potential for nonconforming future behavior, despite the hearsay nature of and unknown source of some of the information. The court thus acted within its discretion in minimizing the likelihood of courtroom disruption. The court need not wait for an escape or a violent tragedy to occur before ordering an appropriate physical restraint. The court's order was particularly appropriate in view of its finding that the "leg brace will not be visible to the jury; will not impede communications with [Packer's] lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant; and [the defendant] will be seated before the jury enters and remain seated until the jury leaves." Although after the trial Packer complained about the emotional distraction and physical discomfort of the leg brace, it was a reasonable physical restraint warranted by the circumstances revealed at the hearing and not necessarily visible by the jury.

The petitioner has not shown that the Court of Appeal's decision on this point was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM PACKER, Petitioner-Appellant, v. DON HILL, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 00-57051 D.C. No. CV 96-04957 HLH ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
November 8, 2001 – Pasadena, California

Filed January 15, 2002

Amended February 27, 2002

Before: Harry Pregerson, Stephen Reinhardt,
and Barry G. Silverman, Circuit Judges.

Opinion by Judge Pregerson;
Dissent by Judge Silverman

SUMMARY

Criminal Law and Procedure/Due Process

The court of appeals reversed a judgment of the district court. The court held that a state court's actions in telling a known lone-holdout juror who asks to be dismissed that deliberations would have to be started all over with another person if she left; reading a letter written by the jury foreman in open court that describes the juror as a person who is unable to understand the rules and to reason; and indicating that the jury should continue deliberating if it would "help" or allow the jury to "progress" after learning that the breakdown was 11 to one, without ever providing a counter-balancing instruction that the juror should not abandon her conscientiously held views, are unduly coercive and violative of a defendant's due process rights.

Appellant William Packer was charged with several crimes, including second degree murder and attempted murder, and tried in California state court. On May 12, 1992, after over 20 hours of deliberation, and after the jury had returned verdicts on all but the murder and attempted murder charges, juror Eve Radcliff wrote the judge, asking to be dismissed due to health problems. The judge encouraged Radcliff to remain on the jury, telling her that deliberations would have to be started all over with another person if she left. The next day, May 13, the state court read a letter written by jury foreman Richard Wyke in open court, in which Wyke described Radcliff as a juror who was unable to understand the rules and to reason. The state court then asked about the jury break down, and, learning that the breakdown was 11 to one, indicated that the jury should continue deliberating if it would "help" or allow the jury to "progress," without ever providing a counter-balancing instruction that Radcliff should not abandon her conscientiously held views. During a May 15 conference, the state court learned that Radcliff felt that she had suffered a "public beating" during the May 13 meeting and was feeling pressured by the other members of the jury to join the majority, but the state court again failed to give a counter-balancing instruction that Radcliff should not surrender her conscientiously held beliefs. The jury convicted Packer of murder, but

acquitted him on 10 other counts.

Packer appealed to the California Court of Appeal, which, in an unpublished opinion, simply mentioned three particular incidents in its analysis and considered each of them separately, finding no reversible error in any of the following: (1) the state court's statement to Radcliff, at the May 12 conference in chambers, that deliberations would have to begin anew if Radcliff were excused; (2) the state court's failure to further clarify the law in light of the instructions given on May 12; or (3) the state court's urging the jury to consider the matter further with the view to reaching an agreement on May 13. The California Supreme Court denied Packer's habeas petition without comment.

The federal district court denied Packer's federal habeas corpus petition, but granted a certificate of appealability on claims including that the state trial judge violated his Fourteenth Amendment right to due process by coercing the jury into rendering a guilty verdict.

Packer appealed.

[1] A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or were based on an unreasonable determination of the facts in light of the evidence presented in the state courts. [2] Coercive statements from the judge to the jury result in a denial of the defendant's right to a fair trial and an impartial jury. The applicable legal principles prohibiting juror coercion and the framework of the totality of circumstances test were clearly established.

[3] Because the California Supreme Court denied Packer's habeas petition without comment, the last reasoned decision of a state court had to be considered as the basis of the state court's judgment. The last reasoned decision of the state court, the California Court of Appeal's unpublished opinion, failed to cite to any federal law, much less the controlling Supreme Court precedents, and failed to apply the totality of

the circumstances test. The California Court of Appeal failed to consider the cumulative impact of the three incidents, as well as the cumulative effect of several other coercive judicial actions and statements. [4] Thus, the state court's decision was contrary to clearly established Supreme Court law.

[5] A petitioner is not entitled to habeas relief unless the court both failed to apply clearly established Supreme Court law and reached an erroneous result that warrants the issuance of a writ. [6] Applying Supreme Court law, the Ninth Circuit has found judges' comments to be unduly coercive and violative of defendants' due process rights in circumstances far less coercive than Packer's. [7] The state court's comments on May 13 amounted to a de facto *Allen* charge to the jury, that is, a charge to work towards unanimity and the minority to reexamine its views. The state court's questions to the foreman about whether further deliberations might "help" the jury to "make further progress" could be understood only to suggest approval for the apparent goal of that "progress" -- unanimous verdict. The state court's comments sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict.

[8] The state court's de facto *Allen* charge was particularly coercive because it knew that Radcliff was the lone hold-out juror and Radcliff knew that it knew she was the hold-out juror. Under these circumstances, the state court's questions about whether further deliberations would help the jury to make further progress, though directed to the foreman, could be read by Radcliff as being leveled only at her. If a judge knows the numerical division of a jury and then gives an *Allen* charge, reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them. [9] The state court's conduct during the May 13 conference was also coercive because it humiliated Juror Radcliff unnecessarily. The state court allowed Radcliff's claimed "public beating" to occur by reading the foreman's letter, unabridged, in open court, and without any attempt to lessen the impact of its attacks of Radcliff. [10] Under these circumstances, the state court's failure to give any counter-balancing instruction on or after May 13 strongly supported

the conclusion that Radcliff was coerced to change her vote.

[11] The Supreme Court has instructed that, when the jury break down is 11 to one, the most extreme care and caution are necessary in order that the legal rights of the defendant should be preserved. The state court did not exercise the care and caution required to preserve Packer's due process rights. [12] The state court's decision was erroneous: the judge's actions and statements were, as a whole, and under all of the circumstances, impermissibly coercive and resulted in a denial of Packer's constitutional right to a fair and impartial jury. Because the judge's coercive actions affected the verdict, the error manifestly had a substantial and injurious effect. The district court's denial of the writ of habeas corpus had to be reversed.

Judge Silverman dissented, writing that Packer failed to show that the Court of Appeal's decision was contrary to, or involved an unreasonable application of clearly established federal law.

COUNSEL

Elizabeth Newman, Los Angeles, California (argued) and Monica Knox, La Crescenta, California (brief), for the petitioner-appellant.

Kenneth N. Sokoler, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

ORDER

The opinion, filed January 15, 2002, is amended as follows:

The paragraph beneath Section II.A., "Exhaustion," on slip opinion page 654, should be deleted and the following should be substituted in its place:

> The State contends that Packer failed to exhaust his claims in state court. However, Packer's Petition for Review, though succinct, " 'fairly presented' ... the 'substance' of his federal habeas corpus claim[s]" to the California Supreme Court. *Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (quoting *Picard v. Connor,* 404 U.S. 270, 277- 78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)). Thus, the State's argument is without merit.

With this amendment, the panel, as constituted above, has unanimously voted to reject the suggestion for rehearing en banc. Judges Pregerson and Reinhardt voted to deny the petition for rehearing, and Judge Silverman voted to grant the petition for rehearing.

The suggestion for rehearing en banc has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

PREGERSON, Circuit Judge:

In 1992, a California state jury convicted William Packer ("Packer") of one count of second degree murder, one count of attempted murder, two counts of attempted robbery, two counts of assault with a deadly weapon, and one count of assault with a firearm. The jury acquitted Packer on ten other counts.

[1] After exhausting his claims in state court,[1] Packer timely filed a federal habeas corpus petition. Magistrate Judge Margaret Nagle prepared a report ("Report") recommending that Packer's petition be denied. District Judge Harry L. Hupp adopted Magistrate Judge Nagle's Report, but granted Packer a certificate of appealability on two of Packer's claims: that the state trial judge violated his Fourteenth Amendment right to due process by coercing the jury into rendering a guilty verdict, and that the state trial judge violated Packer's Sixth and Fourteenth Amendment rights by ordering him to wear a concealed leg brace at trial that caused Packer pain and prevented him from straightening his leg. Because we hold for Packer on the first claim, we reverse the district court and remand with instructions to grant the writ of habeas corpus.[2]

I. Background

A. Juror Coercion Claim

On May 12, 1992, after over twenty hours of deliberation, and after the jury had returned verdicts on all but the murder and attempted murder charges, Juror Eve Radcliff ("Juror Radcliff") wrote the judge, asking to be dismissed "[d]ue to health problems." Judge Phelps and Juror Radcliff then met outside the presence of the defendant and the attorneys. The following conversation ensued:

Radcliff: Well, since I wrote that letter I have been thinking over things a little bit and I think maybe I should – see, these are some very serious charges.

Judge: They certainly are. I don't want to know how they been voted on. I don't want to know how they been voted on.

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1. See Section II.A, *infra.*

2. We review a district court's decision to dismiss a petition for writ of habeas corpus de novo. *Miles v. Prunty,* 187 F.3d 1104, 1105 (9th Cir.1999).

Radcliff: Certainly not, your Honor. But I can't--because of the seriousness of the charges, I can't make snap decisions. And just as in your instructions you stated to us certain things to practice in deliberations. I was beginning to feel a little burned out.

Judge: We all are.

Radcliff: Yeah.

. . . . .

Judge: [Y]ou are going to take off Thursday and we're going to allow that. So you think you can hold out just a little bit longer?

Radcliff: Yes.

Judge: I really appreciate it. *Otherwise, they have to start deliberations all over again with another person.*[3]

Radcliff: That's what I understand.

(Emphasis supplied).

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3. California law allows for the substitution of an alternate juror after a verdict has been reached on some but not all of the counts, provided that the trial court instructs the panel to begin deliberations anew on the remaining counts. *People v. Aikens,* 207 Cal.App.3d 209, 211, 254 Cal.Rptr. 30 (1988). A juror can be substituted if he or she becomes sick, or for other "good cause," including the juror's inability to render a fair and unbiased verdict. *People v. Delamora,* 48 Cal.App.4th 1850, 1855, 56 Cal.Rptr.2d 382 (1996) (jurors cannot be excused if they are not ill or otherwise unable to perform their duties); *People v. Farris,* 66 Cal.App.3d 376, 386, 136 Cal.Rptr. 45 (1977) ("good cause" is shown if the juror is unable to "render a fair and unbiased decision").

The next day, May 13, Judge Phelps received a note from the jury foreman, Richard Wyke ("Foreman Wyke"). Foreman Wyke wrote:

> I believe we have reached a state where we can no longer deliberate. One juror, Eve Radcliff, does not appear to be able to understand the rules as given by you. I have been approached by nearly all my fellow jurors questioning her ability to understand the rules and her ability to reason. I feel that if we continue we will end up as a hung jury, not based on facts and evidence, but one person's inability to reason or desire to be unreasonable.

Judge Phelps read the note aloud in open court, in the presence of the attorneys, the defendant, and all of the jurors. Judge Phelps then asked Foreman Wyke whether the jury was deliberating. Wyke responded that they were "just having the same conversation over the same issue time and time again." Judge Phelps asked whether the dispute was factual. Wyke responded that "[i]t basically comes down to there's a point where the rules of law, or as has been described, we just have a total difference of opinion over. I think we have a state of denial almost where its just not happening." Judge Phelps then explained:

> The juror has a right to do that, as you all know. They have a right to disagree with everybody else. But they do not have a right to not deliberate. They must deliberate and follow the rules and laws as I state it to them.

After more discussion, Judge Phelps said:

Judge: The next question I have for you, I just want two numbers and that's all. I want to know nothing else but two numbers. I'll ask you this. In your last ballot what was the ballot? *What was the count? Don't tell me for or against, just numbers.*

Wyke: I know. The last one was 11 to 1.

Judge: 11 to 1.

Judge: The one before that was 10 and 2.

Judge: *Do you think that further deliberations might help.* I think you're off tomorrow, are you not?

Wyke: Yes.

Judge: *Do you think if you take off now and come back Friday you might be able to make further progress?....*

Wyke: It comes down to interpreting.

Judge: It's been a long time for you people.

Wyke: Yes. We are getting tired of each other. It comes down to interpreting the laws as given to us, and if one person's interpretation is inflexible in their view, I don't know that it will do us any good.

Radcliff: Or different.

Judge: *Has the person been deliberating?* And discussing–

Wyke: *Yes. I'm not questioning that.* We might give it a shot and come back Friday morning. If it continues we are going to be hung.

Judge: If you do that, then *what you're saying to me is there's a possibility you could reach a verdict, but let's take a little time off. That might help? I don't think it would hurt.*

(Emphasis supplied). Jurors then began asking questions about the deliberative process and the following conversation ensued:

Radcliff: Was there something regarding morals in the instructions that you gave us?

Judge: I don't think so. No.

Radcliff: You cannot give us an interpretation of the law.

Judge: No. I cannot do that.

Radcliff: It's up to us individually to interpret the law and apply it.

Judge: What you do is--like I think what the instructions were--you apply the facts to the law and you arrive at a decision. *The law is right there,* and I think elements of the law was given to you in those instructions. They do this or not do this? Was it proven beyond a reasonable doubt? This element, this element, this element? If they did and you find unanimously they did that, you must follow the law and find them either guilty or not guilty of that charge.

(Emphasis supplied). At this point, defense counsel objected and, in a side bar, said that Judge Phelps was misstating the instructions and improperly "instructing the jury ... as to their manner of deliberation." Defense counsel then asked that Judge Phelps instruct the jury only that they are "to follow the law as I give it to you and to refrain from explaining further what that instruction might mean in practice." The prosecutor offered that Juror Radcliff's comments reflected that she was not going to follow the law. Judge Phelps overruled defense counsel's objection and instructed the jury as follows:

> Ladies and Gentlemen, the only thing I'm going to tell you right now is; once again, I told you, you'll look up in the instructions paraphrasing it, I think I'm using the correct words: you're the sole judges of the facts. You determine the facts. You then apply the law to those facts as I state it to you, and you must accept and follow the law. You can't make up your own law. You must accept and follow the law as I state it to you.

Judge Phelps then excused the jury until Friday.

On Friday, May 15, the jury continued its deliberations. That afternoon, Juror Radcliff submitted a second letter to Judge Phelps that read:

> Due to the public beating in the jury box I experienced Wednesday, and the beatings I experience in the deliberation room from other jurors, I am again submitting a request to be dismissed from continuing on this jury.
>
> I now am struggling with a feeling of distrust and disrespect from the other jurors, borne out of the letter that was submitted to you, regarding my so-called "refusal" to accept or agree with the other jurors' thinking.
>
> I did not know *anything* about the letter that the other jurors/foreman submitted to you regarding me. As I result I find it difficult to continue in deliberations.
>
> Respectfully submitted, Eve Radcliff
>
> P.S. Though the proceedings have improved in their nature, I have reached a point of anger, and I don't believe I can be objective.

(Emphasis in original). After reading Juror Radcliff's second letter to the attorneys in chambers, defense counsel stated that Radcliff was "being driven off the jury." Judge Phelps informed counsel that he was going to call Juror Radcliff into chambers. Defense counsel objected to Judge Phelps's decision to call Juror Radcliff into chambers.[4] Defense counsel said:

> Let me -- just so I can get my record clear. Let me say that I--

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4. Defense counsel additionally argued that Packer would be denied a jury drawn from a fair cross-section of the community were Juror Radcliff excused because she was one of two black people on the jury.

> also *I object to this procedure*. I feel what's happening is that *Miss Radcliff is being singled out. And it's more pressure on her to either change her vote or be excused. And I think this is the process that causes that.* This causes somebody -- especially when she is going to come into chambers with just the court and counsel, puts her in a very difficult position.

When Juror Radcliff was brought into chambers, she said a "personality ething" was affecting deliberations. As she explained:

> *I didn't know about the letter that they submitted to you until like a minute and a half before we went out in the box.* And then when it was read, it sounded to me like they wanted--the intent was for me--they were upset because I didn't--I wasn't--okay. I think if I recall correctly something like, refuses to understand our thinking, or refuses to accept our line of reasoning, or refuses to accept the law. I think that's what they said or something like that. And I took that to mean that things weren't going the way that they were supposed to go, because at that point I was giving them responses, you know. *We were deliberating, I thought, but they felt that they weren't getting from me the type of responses that they wanted* because I didn't see what they were saying....

(Emphasis supplied). After Judge Phelps asked Juror Radcliff whether she was continuing to deliberate, she explained that she was trying, but said "[i]t's not to their satisfaction, that's what part of the problem is." Judge Phelps said: "Two weeks is a long, long time, it is, and I appreciate that. Okay. I think I understand. Thank you very much." Juror Radcliff returned to the jury room.

Judge Phelps then called in Foreman Wyke to meet with him and the attorneys. Judge Phelps asked Wyke: "is the position that you have reached in your deliberations that you can't go any further or do you think that--how do you feel about it?" Wyke explained their current deliberations process and repeatedly confirmed that Juror Radcliff was continuing to deliberate. Wyke was excused from Judge Phelps's

chambers, and the jury continued to deliberate.

At the end of that day the jury was excused until Tuesday, May 19. On the morning of May 19, Juror Radcliff wrote Judge Phelps again, "requesting to speak with [the Judge] alone, in the presence of a court reporter only, if possible." Judge Phelps did not meet with Juror Radcliff.[5/] The jury rendered a guilty verdict on the attempted murder charge late in the afternoon of May 19, and was then excused for the day. Early in the morning of May 20, the jury rendered a guilty verdict on the murder charge.

B. Leg Brace Claim

The day after the jury was sworn, the Sheriff's Department requested that Packer wear a leg brace underneath his pants during trial. The leg brace locked in a straight position when the wearer stood, was worn under one pant leg, and attached with velcro to the thigh and calf.

At the Sheriff's Department's request and over defense counsel's objection, Judge Phelps held an in camera hearing to review the evidence supporting the request. During the in camera hearing, Sergeant Fogerty and two Deputies, Leibrich and McCarthy, explained that they sought the leg brace because James "Doc" Holliday ("Holliday"), one of Packer's prospective witnesses, was a "very high security risk." Sergeant Fogerty explained, under oath:

> I received some information from Deputy Chaffin from the Security Unit yesterday that our Special Investigations Bureau has information that somebody connected with Holliday has said that when he gets to L.A., that stuff is going to happen. He's got nothing to lose. He wants out. He's a high escape risk.

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5. In another handwriting, at the bottom of the note, was written: "request cancelled at 9:25 a.m." It is unclear from the record who canceled the request.

Judge Phelps asked how this information applied to Packer. Deputy McCarthy explained, in an unsworn statement, that:

> James Holliday's wife has had communications with Packer, and that the information is that the communication between the two of them was: "I'll see you in Los Angeles, and that that's when its going to happen." Now, what we're trying to do now is establish exactly who the source is of that information, and that's the part that we don't want to disclose in court.[6/]

Finally, the Sheriff's Department reported--during the in camera hearing and, at Judge Phelps's request, in open court--that they also sought a leg brace because Packer had a "special handling card" at the county jail, which was described as "a description of an inmate's possible potential problems of some sort," and because Packer had caused "some major disturbances" including "gang fights" while in custody.

Defense counsel countered that the only prison disturbance Packer had been involved in was in 1982, while Packer was in custody on another case, and that Packer was ultimately acquitted of charges arising out of that disturbance. Packer also testified in opposition to the use of the leg brace. Packer challenged the Sheriff's Department's characterization of his conduct while in custody and testified that, in his experience, restraints "definitely inhibit[] one's ability to function, to communicate ... [, and] to concentrate."

Judge Phelps ordered Packer to wear the leg brace during trial. Judge Phelps found that the leg brace was necessary based upon testimony received at the in camera hearing and the testimony in open court, and concluded that the leg brace would not compromise the integrity of the proceedings. Judge Phelps explained:

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6. Deputy McCarthy's information is contradicted by Packer's undisputed declaration that Holliday's wife was in federal custody at the time the alleged "communication" occurred between Packer and Holliday's wife.

> [T]he leg brace will not be visible to the jury; will not impede communications with his lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant; and would not be -- he will be seated before the jury enters and remain seated until the jury leaves. If the defendant chooses to take the stand, he'll be on the stand before the jury enters and remain on the stand until after the jury leaves.

As a result of the leg brace, Packer was required to remain seated at all times and was, therefore, unable to stand when the judge and jury entered the courtroom. Holliday was never called as a witness.

II. Discussion

A. Exhaustion

The State contends that Packer failed to exhaust his claims in state court. However, Packer's Petition for Review, though succinct, " 'fairly presented' ... the 'substance' of his federal habeas corpus claim[s]" to the California Supreme Court. *Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (quoting *Picard v. Connor,* 404 U.S. 270, 277-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)). Thus, the State's argument is without merit.

B. Merits

1. Packer's Fourteenth Amendment due process rights were violated because there is a strong likelihood that Judge Phelps's coercive statements and actions during the jury's deliberations caused Juror Radcliff to change her vote.

[1] A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or were "based on an unreasonable determination of the

facts in light of the evidence presented" in the state courts.[7] 28 U.S.C. § 2254(d). Under the "contrary to" clause, a state court's decision is contrary to Federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard,* 234 F.3d 1072, 1077 (9th Cir.2000); *see also Williams v. Taylor,* 529 U.S. 362, 405-07, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Lajoie v. Thompson,* 217 F.3d 663, 667 (9th Cir.2000); *Tran v. Lindsey,* 212 F.3d 1143, 1150 (9th Cir.2000).

[2] Here, Packer's juror coercion claim is governed by Federal law first set forth in *Jenkins v. United States,* 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) and expanded upon in *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).[8] Coercive statements from the judge to the jury result in a denial of the defendant's right to a fair trial and an impartial jury. *Lowenfield,* 484 U.S. at 241, 108 S.Ct. 546. In order to determine whether the judge's comments were impermissibly coercive, the court must evaluate them "in [their] context and under all the circumstances." *Id.* at 237, 108 S.Ct. 546 (quoting *Jenkins,* 380 U.S. at 446, 85 S.Ct. 1059). The fact that Supreme Court law sets forth a fact- intensive inquiry to determine the extent of the statements' coerciveness "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams,* 529 U.S. at 391, 120 S.Ct. 1495 (stating this in regard to *Strickland*'s case-by-case approach); *see also Fisher v. Roe,* 263 F.3d 906, 914 (9th Cir.2001) (holding Supreme Court law "clearly established" because Supreme Court "set forth a working constitutional standard by which to evaluate [the claim at issue]"). Therefore, the

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7. Packer's petition is governed by the standards of 28 U.S.C § 2254 because his habeas petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act, the statute which enacted the current standards governing the granting of the writ of habeas corpus.

8. *See also Brasfield v. United States,* 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926); *Burton v. United States,* 196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482 (1905).

applicable legal principles prohibiting juror coercion and the framework of the totality of circumstances test were "clearly established" for purposes of § 2254(d)(1).

[3] Because the California Supreme Court denied petitioner's habeas petition without comment, we look to the last reasoned decision of a state court as the basis of the state court's judgment. *Shackleford v. Hubbard,* 234 F.3d 1072, 1079 n. 2 (9th Cir.2000); *see also Ylst v. Nunnemaker,* 501 U.S. 797, 803-04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, the last reasoned decision of the state court, the California Court of Appeal's unpublished opinion,[9/] failed to cite to any federal law, much less the controlling Supreme Court precedents. Moreover, the court failed to apply the totality of the circumstances test as required by *Lowenfield* and *Jenkins.* Rather than evaluating the totality of the circumstances under which the judge's actions and comments occurred, as required by *Lowenfield* and *Jenkins,* the California Court of Appeal simply mentioned three particular incidents in its analysis and considered each of them separately, finding no reversible error in any of the following: (1) Judge Phelps's statement to Juror Radcliff, at the May 12 conference in chambers, "that deliberations would have to begin anew if [Radcliff] were excused"; (2) Judge Phelps's failure to further clarify the law in light of the instructions given on May 12; or (3) Judge Phelps's "urging the jury to consider the matter further with the view to reaching an agreement" on May 13. The California Court of Appeal failed to consider the cumulative impact of these three incidents, as well as the cumulative effect of several other coercive judicial actions and statements in this case.[10/]

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9. *See People v. Jordan, et al.*, No. A958712 (Ca. Ct.App. filed Apr. 13 1995).

10. Significantly, the court does not even mention in its analysis that Judge Phelps inquired about the breakdown of the jury and, after learning that it was first ten to two and then eleven to one, directed the jury to return to its deliberations. *See Lowenfield,* 484 U.S. at 239- 41, 108 S.Ct. 546; *Brasfield v. United States,* 272 U.S. 448, 449, 47 S.Ct. 135, 71 L.Ed. 345 (1926); *Burton v. United States,* 196 U.S. 283, 307,

[4] In addition to failing to apply controlling Supreme Court law, the state court made an explicit statement of law that is contrary to Supreme Court precedent. The California Court of Appeal stated that "there is nothing improper in urging the jury to consider [a case] further with the view to reaching an agreement as long as the language used does not coerce a particular type of verdict." However, the Supreme Court has held a judge's instructions to be coercive simply because it coerced *a* verdict. The error lies in simply pressuring the jurors to arrive at *some* verdict, not in urging the jury to reach a particular verdict. *See Gypsum Co.,* 438 U.S. at 461, 98 S.Ct. 2864 (holding reversible error when judge implied that he wanted the jury to reach a verdict "one way or the other"); *Jenkins,* 380 U.S. at 446, 85 S.Ct. 1059 (holding reversible error when judge told the jury, "you have got to reach a decision in this case"). Thus, the state court's decision was contrary to clearly established Supreme Court law, not only because it failed to apply the governing law, but also because its partial rationale directly contradicted Supreme Court precedent.[11/] *See Campbell v. Rice,* 265 F.3d 878, 889- 90 (9th Cir.2001); *Lockhart v. Terhune,* 250 F.3d 1223, 1229, 1232 (9th Cir.2001); *Shackleford,* 234 F.3d at 1078; *McClain v. Prunty,* 217 F.3d 1209, 1223 (9th Cir.2000).

[5] However, the petitioner is not entitled to habeas relief unless the California Court of Appeal both failed to apply clearly established Supreme Court law and reached an erroneous result that warrants the issuance of a writ. *See Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Given our conclusion that the state

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25 S.Ct. 243, 49 L.Ed. 482 (1905). The state court also failed to consider the following critical facts: (1) Judge Phelps knew that Radcliff was the sole dissenting juror prior to his instructing the jury to keep deliberating; and (2) Judge Phelps's action of reading the note from Foreman Wyke out loud in front of the jury and identifying juror Radcliff by name.

11. In fact, in this case the state court failed even to consider whether a federal constitutional violation occurred, as the petitioner had urged; instead it addressed only issues of state law.

court failed to apply clearly established Federal law, we must now determine whether its decision constituted error and if so whether the error had a substantial or injurious effect on the verdict. *See id.* Our first task is to look to Supreme Court case law and our own cases (and in appropriate instances those of other circuits), and apply them in the ordinary course.[12/] In the case before us, our analysis of the applicable federal law compels us to conclude that the judge's statements were impermissibly coercive.

[6] Applying Supreme Court law, we have found judges' comments to be unduly coercive and violative of defendants' due process rights in circumstances far less coercive than those present here. In *Jiminez v. Myers,* 40 F.3d 976 (9th Cir.1993), the trial judge met twice with a deadlocked jury. *Id.* at 978-79. In the first meeting, the judge asked how many votes had been taken, how the breakdown of the votes began and ended, and whether there had been any "movement." *Id.* at 979. After the foreman replied that there was "movement," the judge returned the jury to its deliberations. *Id.* After further deliberations, the jury met again with the judge and informed him that it was divided eleven to one. *Id.* The judge noted that there had been "substantial movement" and sent the jury back to deliberate. *Id.* Less than two hours later, the jury returned with a unanimous verdict. *Id.*

We concluded in *Jiminez* that the trial court's comments and conduct "amounted to giving the jury a de facto *Allen* charge."[13/] *Id.* at 980. In support of this conclusion, we observed:

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12. Unlike in those post-ADEPA § 2254 cases in which the state court *applied* the controlling federal law but the petitioner urges that the application was unreasonable, here the state court *failed to apply* the controlling Federal law, and so the result it reached need not be clearly erroneous in order for a writ to issue; the fact that the result is erroneous is sufficient, so long as the *Brecht* standard is met.

13. An *Allen* charge "instructs the jurors to work towards unanimity and the minority to reexamine its views." *Jiminez,* 40 F.3d at 980.

> In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, *the judge's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict,* and the hold-out juror was to cooperate in the movement toward unanimity.

Id. at 981 (emphasis supplied). Under these circumstances, we held, the judge's "failure to counter-balance the implication of its questions and comments by instructing the hold-out juror not to surrender his or her sincere convictions strongly supports the conclusion that the jury was impermissibly coerced to render a unanimous verdict." *Id.* (citation omitted).

[7] Judge Phelps's comments on May 13 amount to a "de facto *Allen* charge." *Id.* Judge Phelps asked about the jury's breakdown, learned that it had been divided ten to two but was currently divided eleven to one, and said that he would send the jurors back to deliberate if the foreman thought that "further deliberations might help" or if the jury might be able "to make further progress." Like the trial judge's approving comments about "movement" in *Jiminez,* Judge Phelps's questions to Foreman Wyke about whether further deliberations might "help" the jury to "make further progress" can only be understood to suggest approval for the apparent goal of that "progress"--a unanimous verdict. As in *Jiminez,* Judge Phelps's comments sent "a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict." *Id.*

[8] Judge Phelps's "de facto *Allen* charge" was particularly coercive because he knew that Juror Radcliff was the lone hold-out juror and Radcliff knew that he knew she was the hold-out juror. When Judge Phelps made his comments, he had read Wyke's letter in open court and learned from Foreman Wyke that the jury breakdown was eleven to one. Under these circumstances, Judge Phelps's questions about whether further deliberations would "help" the jury to "make further progress,"

though directed to Foreman Wyke, "could only be read by [Radcliff] as being leveled at [her]." *United States v. Sae-Chua,* 725 F.2d 530, 532 (9th Cir.1984).

> [S]he could hardly escape reasoning that the judge was not likely to believe that [s]he could persuade the opposing eleven to adopt [her] position--a position the foreman had felt to be improperly taken; and that *[s]he, individually, was being urged by the judge to reconsider [her] vote.*

Id. (emphasis supplied). We have held that if a judge knows the numerical division of a jury and then gives an *Allen* charge, "reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them--that is, if the judge knew which jurors were the holdouts and each holdout juror knew that the judge knew he was a holdout." *United States v. Ajiboye,* 961 F.2d 892, 894 (9th Cir.1992). Even though Judge Phelps did not actually give an *Allen* charge, his comments had the same meaning and effect, and therefore, the comparable circumstances present here merit the same findings of coercion and error: "[s]o long as the defendant has offered facts that fairly support an inference that jurors who did not agree with the majority felt pressure from the court to give up their conscientiously held beliefs in order to secure a verdict, we must proceed to the *Allen* charge analysis." *Weaver v. Thompson,* 197 F.3d 359, 365 (9th Cir.1999).

[9] Judge Phelps's conduct during the May 13 conference was also coercive because it humiliated Juror Radcliff unnecessarily. Judge Phelps read Foreman Wyke's letter in open court, including its references to Juror Radcliff as a juror who "does not appear to be able to understand the rules," and about whom Wyke had been "approached by nearly all [his] fellow jurors questioning her ability to understand the rules and her ability to reason." As is evidenced by Juror Radcliff's May 15 note and her comments during the meeting in chambers with Judge Phelps and the attorneys, hearing Wyke's letter felt like a "public beating" that was intended to make her change her vote. Judge Phelps allowed this "public beating" to occur by reading Wyke's letter, unabridged, in open court, and without any attempt to lessen the impact of its ad hominem attacks

of Juror Radcliff.

[10] Under these circumstances, Judge Phelps's failure to give any counter- balancing instruction on or after May 13 strongly supports the conclusion that Juror Radcliff was coerced to change her vote.[14] Although Judge Phelps commented that "the juror" had a right "to disagree with everybody else" at the beginning of the conference on May 13, he immediately countered that she did not "have a right to not deliberate," told Radcliff that "[t]he law is right there" and she must "follow the law," and instructed the jurors that they "must accept and follow the law" and "can't make up [their] own law." Judge Phelps never reminded Radcliff or the other jurors of their obligation not to surrender their conscientiously held beliefs. Judge Phelps again failed to give a counter-balancing instruction on May 15, when he met with Juror Radcliff and the lawyers. A counter-balancing instruction would have been particularly appropriate under the circumstances of the meeting which, as defense counsel observed, "put[] her in a very difficult position," and was "more pressure on her to either change her vote or be excused."[15] Given the feelings of humiliation and pressure that Juror Radcliff expressed during the May 15 conference, a counter-balancing instruction would undoubtedly have been welcomed.

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14. Judge Phelps did give a counter-balancing instruction in the instructions he gave *before* the jury began its deliberations.

15. The dissent contends that because defense counsel did not object to the judge's allowing the deliberations to continue with Juror Radcliff on the jury *after* the May 15 meeting, Packer should not now be able to argue that Juror Radcliff was coerced. However, there is no precedent that suggests that a defense attorney's desire to have a particular juror remain on the jury renders a judge's coercive statements to the jury harmless. Indeed, such a desire may make the need for a counter-balancing instruction even greater. Here, although defense counsel did argue that Radcliff should remain on the jury, he also urged that she not be pressured to change her vote and that the judge not meet privately with her in his chambers.

[11] The Supreme Court has instructed that, where the jury break down is eleven to one, "the most extreme care and caution [are] necessary in order that the legal rights of the defendant should be preserved." *Burton v. United States,* 196 U.S. 283, 307, 25 S.Ct. 243, 49 L.Ed. 482 (1905). Judge Phelps did not exercise the care and caution required to preserve Packer's due process rights. One day after Judge Phelps had encouraged Juror Radcliff to remain on the jury despite her request to be excused, Judge Phelps read Foreman Wyke's letter in open court, in which Wyke described Radcliff as a juror who was unable to "understand the rules" and "reason." Judge Phelps then asked about the jury break down, and, learning that the breakdown was eleven to one, indicated that the jury should continue deliberating if it would "help" or allow the jury to "progress" without ever providing a counter-balancing instruction that Juror Radcliff should not abandon her conscientiously held views. During the May 15 conference, Judge Phelps learned that Juror Radcliff felt that she had been "beaten" during the May 13 meeting and was feeling pressured by the other members of the jury to join the majority, but Judge Phelps again failed to give a counter-balancing instruction that Radcliff should not surrender her conscientiously held beliefs.

[12] In sum, the California Court of Appeal's decision was "contrary to ... clearly established Federal law" because it failed to apply clearly established Supreme Court law. 28 U.S.C. § 2254(d). After examining the relevant federal juror coercion cases, we hold that the state court's decision was erroneous: the judge's actions and statements were, as a whole, and under all of the circumstances, impermissibly coercive and resulted in a denial of Packer's constitutional right to a fair and impartial jury. Because the judge's coercive actions affected the verdict, the error manifestly had a "substantial and injurious effect." *Brecht,* 507 U.S. at 637, 113 S.Ct. 1710. We therefore reverse the district court's denial of the writ of habeas corpus and remand with instructions to grant the writ.

2. Although Packer's due process rights were violated when Judge Phelps ordered Packer to wear a leg brace during trial, Packer is not entitled to relief because the error was harmless.

Although the Due Process clause of the Fourteenth Amendment generally protects a defendant's right to appear at trial without shackles or other physical restraints, a trial judge's decision to restrain a defendant at trial is not unconstitutional per se. *Illinois v. Allen,* 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The Supreme Court has held that in order to maintain the proper "dignity, order, and decorum" during court proceedings, "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id.* at 343, 90 S.Ct. 1057. Because of their potential for prejudice, however, due process requires that restraints be used only as a "last resort." *Id.* at 344, 90 S.Ct. 1057.

In this case, the only evidence supporting the Sheriff Department's application for a leg brace was unsworn, hearsay testimony regarding a potential witness's plan to do "stuff" while in Los Angeles. None of the evidence submitted at the hearing reflected that Packer was going to participate in the "stuff," and none of the evidence established that the "stuff" contemplated would cause Packer to engage in disruptive courtroom behavior or an attempt to escape. Moreover, Packer had never attempted escape and had, for the most part, a clean disciplinary history while in custody. There were, in sum, no persuasive reasons why it was necessary to resort to restraints.

In addition, Judge Phelps never considered any alternatives less restrictive than the leg brace. In light of the fact that the evidence reflected only that "stuff" might happen if and when Holliday appeared as a witness, it would have been sensible to wait until Holliday was, in fact, called as a witness to impose any physical restraint. It would have been more sensible still to impose a physical restraint on Holliday, who was the flight risk, instead of Packer. Particularly in light of the fact that Holliday was never called as a witness at Packer's trial, Judge Phelps's action was unwarranted. Clearly, in this case the imposition of physical

restraints was not a "last resort."

Nevertheless, Packer is not entitled to habeas relief on this claim because he cannot show prejudice resulting from the leg brace. *Duckett v. Godinez,* 67 F.3d 734 (9th Cir.1995); *Castillo v. Stainer,* 983 F.2d 145, 149 (9th Cir.1992). None of the jurors who were interviewed after trial remembered seeing the leg brace on Packer. *See Castillo,* 983 F.2d at 149 (shackling was harmless error because defendant wore waist chain that could not be seen by the jury); *Jones,* 899 F.2d at 885 (no prejudice when defendant's handcuffs were hidden by his shirt or jacket at all times). Although Packer argues that the leg brace impeded his ability to participate in his defense, he has not shown that his alleged inability to contribute to his defense had a " 'substantial and injurious effect or influence in determining the verdict.' " *Brecht,* 507 U.S. at 623, 113 S.Ct. 1710 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). In sum, the decision to order Packer to wear a leg brace did not deny him a fair trial under the circumstances.

CONCLUSION

While we agree with the district court's rejection of Packer's leg brace claim, we reverse its decision to deny the writ of habeas corpus because we upheld Packer's juror coercion claim. We remand to the district court for the granting of the writ of habeas corpus.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

I respectfully dissent over two poir..s.

I. The Jury Issue

The majority glosses over a key fact concerning the jury problem: Defense counsel was aware of everything the judge had said and done,

but instead of moving for a mistrial, defense counsel implored the judge to keep Radcliff on the jury and stated that he had no objection to allowing the deliberations to continue.

On the afternoon of May 15, the judge informed counsel of Radcliff's "public beating" note. Defense counsel responded:

> Well, I think that she's being driven off the jury. And what she's saying here is she is angry and upset and that she's getting treated badly by the other jurors. *That doesn't make her a person that's unable to continue.* That just means that she doesn't like it.

(Emphasis added.)

The judge then stated his intention to interview Radcliff in chambers in the presence of both counsel. Before the interview began, defense counsel made it clear to the judge that he did not want to lose Radcliff as a juror:

> [DEFENSE COUNSEL]: This would be the--if you decided to excuse her, this would be the second black juror and a woman, and a black woman. I think that we would then be deprived of a fair cross-section of the community and I would ask for a mistrial.
>
> THE COURT: You mean based on the fact that there is a black person being dismissed?
>
> [DEFENSE COUNSEL]: Yes.

Just before the interview commenced, defense counsel objected to the procedure of singling out Radcliff for interview on the grounds that the procedure would pressure her to "change her vote or be excused." However, *after* Radcliff was questioned and had left the room, defense counsel made only one statement: "Sounded like an intelligent, articulate person who has a difference of an opinion." He no longer

voiced any objection to the procedure, made no mention of any coercion or pressure, and made no motion for mistrial.

After foreman Wyke was interviewed and left chambers, the judge announced his decision to "let them continue to deliberate." The judge also briefly discussed a minor scheduling issue. After stating his rulings, the judge said to counsel, "Any objection to that?" Defense counsel replied, "No, I don't."

A party is not permitted to wait-and-see what a verdict will be, and then upon receiving an unfavorable result, raise for the first time a problem with the jury of which he was previously aware. As the First Circuit put it, "We will not allow counsel to stand by quietly and gamble on a favorable verdict, only to complain when it turns out to be otherwise." *United States v. Morris,* 977 F.2d 677, 686 (1st Cir.1992). Defense counsel knew full well how the judge had responded to the Radcliff situation, but defense counsel wanted *this* jury to continue its deliberations notwithstanding whatever the judge did, or could have done better. Had the judge declared a mistrial sua sponte based on either Radcliff's statements or the judge's own statements, the petitioner would have had a legitimate right to complain that a mistrial violated his right against Double Jeopardy. *See United States v. Shaw,* 829 F.2d 714, 719 (9th Cir.1987) (citing *Arizona v. Washington,* 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Defense counsel's faith in this jury was not altogether misplaced: The jury acquitted the petitioner of 10 of the 17 counts.

Perhaps the reason that defense counsel did not seek a mistrial is that he recognized at the time, as the California Court of Appeal and the district court did later, that the judge's comments did no harm. *After* the coercion supposedly began, the jurors deliberated for at least an *additional* eight and a half hours. This fact strongly suggests the absence of coercion. We have held that claims of jury coercion were rebutted by much shorter periods of continued deliberations following supposed coercion. *See., e.g., United States v. Daas,* 198 F.3d 1167, 1180 (9th Cir.1999) (one hour); *United States v. Plunk,* 153 F.3d 1011, 1027 *amended on denial of reh'g,* 161 F.3d 1195 (9th Cir.1998), (roughly two

hours); *United States v. Easter,* 66 F.3d 1018, 1023 (9th Cir.1995) (two and a half hours); *United States v. Lorenzo,* 43 F.3d 1303, 1307, n. 3(9th Cir.1995) (five and one-half hours); *United States v. Bonam,* 772 F.2d 1449, 1451 (9th Cir.1985) (90 minutes); *United States v. Beattie,* 613 F.2d 762, 766 (9th Cir.1980) (three and a half hours).

In this case, the California Court of Appeal held that "the comments made and not made by the court to the jury did not coerce a particular verdict or deny Packer any constitutional rights." The petitioner has failed to demonstrate that this decision was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, as required for relief under 28 U.S.C. § 2254(d)(1).

II. The Leg Brace

I agree with the majority that the petitioner has failed to show that he was prejudiced by having to wear a leg brace under his clothing. However, I cannot agree with the portion of the opinion that says that the petitioner's rights were violated by his having to wear the brace to begin with. A trial judge has wide discretion to decide whether public safety considerations warrant increased security measures. *See Morgan v. Bunnell,* 24 F.3d 49, 51 (9th Cir.1994). The California Court of Appeal reviewed the trial court's hearing on the matter and held:

> The record at the hearing ... established Packer's potential for nonconforming future behavior, despite the hearsay nature of and unknown source of some of the information. The court thus acted within its discretion in minimizing the likelihood of courtroom disruption. The court need not wait for an escape or a violent tragedy to occur before ordering an appropriate physical restraint. The court's order was particularly appropriate in view of its finding that the "leg brace will not be visible to the jury; will not impede communications with [Packer's] lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant; and [the defendant] will be seated before the jury

> enters and remain seated until the jury leaves." Although after the trial Packer complained about the emotional distraction and physical discomfort of the leg brace, it was a reasonable physical restraint warranted by the circumstances revealed at the hearing and not necessarily visible by the jury.

The petitioner has not shown that the Court of Appeal's decision on this point was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM PACKER, Petitioner-Appellant, v. DON HILL, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 00-57051 D.C. No. CV 96-04957 HLH OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
November 8, 2001 – Pasadena, California

Filed January 15, 2002

Before: Harry Pregerson, Stephen Reinhardt,
and Barry G. Silverman, Circuit Judges.

Opinion by Judge Pregerson;
Dissent by Judge Silverman

SUMMARY

Criminal Law and Procedure/Due Process

The court of appeals reversed a judgment of the district court. The court held that a state court's actions in telling a known lone-holdout juror who asks to be dismissed that deliberations would have to be started all over with another person if she left; reading a letter written by the jury foreman in open court that describes the juror as a person who is unable to understand the rules and to reason; and indicating that the jury should continue deliberating if it would "help" or allow the jury to "progress" after learning that the breakdown was 11 to one, without ever providing a counter-balancing instruction that the juror should not abandon her conscientiously held views, are unduly coercive and violative of a defendant's due process rights.

Appellant William Packer was charged with several crimes, including second degree murder and attempted murder, and tried in California state court. On May 12, 1992, after over 20 hours of deliberation, and after the jury had returned verdicts on all but the murder and attempted murder charges, juror Eve Radcliff wrote the judge, asking to be dismissed due to health problems. The judge encouraged Radcliff to remain on the jury, telling her that deliberations would have to be started all over with another person if she left. The next day, May 13, the state court read a letter written by jury foreman Richard Wyke in open court, in which Wyke described Radcliff as a juror who was unable to understand the rules and to reason. The state court then asked about the jury break down, and, learning that the breakdown was 11 to one, indicated that the jury should continue deliberating if it would "help" or allow the jury to "progress," without ever providing a counter-balancing instruction that Radcliff should not abandon her conscientiously held views. During a May 15 conference, the state court learned that Radcliff felt that she had suffered a "public beating" during the May 13 meeting and was feeling pressured by the other members of the jury to join the majority, but the state court again failed to give a counter-balancing instruction that Radcliff should not surrender her

conscientiously held beliefs. The jury convicted Packer of murder, but acquitted him on 10 other counts.

Packer appealed to the California Court of Appeal, which, in an unpublished opinion, simply mentioned three particular incidents in its analysis and considered each of them separately, finding no reversible error in any of the following: (1) the state court's statement to Radcliff, at the May 12 conference in chambers, that deliberations would have to begin anew if Radcliff were excused; (2) the state court's failure to further clarify the law in light of the instructions given on May 12; or (3) the state court's urging the jury to consider the matter further with the view to reaching an agreement on May 13. The California Supreme Court denied Packer's habeas petition without comment.

The federal district court denied Packer's federal habeas corpus petition, but granted a certificate of appealability on claims including that the state trial judge violated his Fourteenth Amendment right to due process by coercing the jury into rendering a guilty verdict.

Packer appealed.

[1] A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or were based on an unreasonable determination of the facts in light of the evidence presented in the state courts. [2] Coercive statements from the judge to the jury result in a denial of the defendant's right to a fair trial and an impartial jury. The applicable legal principles prohibiting juror coercion and the framework of the totality of circumstances test were clearly established.

[3] Because the California Supreme Court denied Packer's habeas petition without comment, the last reasoned decision of a state court had to be considered as the basis of the state court's judgment. The last reasoned decision of the state court, the California Court of Appeal's unpublished opinion, failed to cite to any federal law, much less the

controlling Supreme Court precedents, and failed to apply the totality of the circumstances test. The California Court of Appeal failed to consider the cumulative impact of the three incidents, as well as the cumulative effect of several other coercive judicial actions and statements. [4] Thus, the state court's decision was contrary to clearly established Supreme Court law.

[5] A petitioner is not entitled to habeas relief unless the court both failed to apply clearly established Supreme Court law and reached an erroneous result that warrants the issuance of a writ. [6] Applying Supreme Court law, the Ninth Circuit has found judges' comments to be unduly coercive and violative of defendants' due process rights in circumstances far less coercive than Packer's. [7] The state court's comments on May 13 amounted to a de facto *Allen* charge to the jury, that is, a charge to work towards unanimity and the minority to reexamine its views. The state court's questions to the foreman about whether further deliberations might "help" the jury to "make further progress" could be understood only to suggest approval for the apparent goal of that "progress" -- unanimous verdict. The state court's comments sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict.

[8] The state court's de facto *Allen* charge was particularly coercive because it knew that Radcliff was the lone hold-out juror and Radcliff knew that it knew she was the hold-out juror. Under these circumstances, the state court's questions about whether further deliberations would help the jury to make further progress, though directed to the foreman, could be read by Radcliff as being leveled only at her. If a judge knows the numerical division of a jury and then gives an *Allen* charge, reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them. [9] The state court's conduct during the May 13 conference was also coercive because it humiliated Juror Radcliff unnecessarily. The state court allowed Radcliff's claimed "public beating" to occur by reading the foreman's letter, unabridged, in open court, and without any attempt to lessen the impact of its attacks of Radcliff. [10] Under these circumstances, the state court's failure to give

any counter-balancing instruction on or after May 13 strongly supported the conclusion that Radcliff was coerced to change her vote.

[11] The Supreme Court has instructed that, when the jury break down is 11 to one, the most extreme care and caution are necessary in order that the legal rights of the defendant should be preserved. The state court did not exercise the care and caution required to preserve Packer's due process rights. [12] The state court's decision was erroneous: the judge's actions and statements were, as a whole, and under all of the circumstances, impermissibly coercive and resulted in a denial of Packer's constitutional right to a fair and impartial jury. Because the judge's coercive actions affected the verdict, the error manifestly had a substantial and injurious effect. The district court's denial of the writ of habeas corpus had to be reversed.

Judge Silverman dissented, writing that Packer failed to show that the Court of Appeal's decision was contrary to, or involved an unreasonable application of clearly established federal law.

COUNSEL

Elizabeth Newman, Los Angeles, California (argued) and Monica Knox, La Crescenta, California (brief), for the petitioner-appellant.

Kenneth N. Sokoler, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

PREGERSON, Circuit Judge:

In 1992, a California state jury convicted William Packer

("Packer") of one count of second degree murder, one count of attempted murder, two counts of attempted robbery, two counts of assault with a deadly weapon, and one count of assault with a firearm. The jury acquitted Packer on ten other counts.

After exhausting his claims in state court,[1] Packer timely filed a federal habeas corpus petition. Magistrate Judge Margaret Nagle prepared a report ("Report") recommending that Packer's petition be denied. District Judge Harry L. Hupp adopted Magistrate Judge Nagle's Report, but granted Packer a certificate of appealability on two of Packer's claims: that the state trial judge violated his Fourteenth Amendment right to due process by coercing the jury into rendering a guilty verdict, and that the state trial judge violated Packer's Sixth and Fourteenth Amendment rights by ordering him to wear a concealed leg brace at trial that caused Packer pain and prevented him from straightening his leg. Because we hold for Packer on the first claim, we reverse the district court and remand with instructions to grant the writ of habeas corpus.[2]

I. Background

A. Juror Coercion Claim

On May 12, 1992, after over twenty hours of deliberation, and after the jury had returned verdicts on all but the murder and attempted murder charges, Juror Eve Radcliff ("Juror Radcliff") wrote the judge, asking to be dismissed "[d]ue to health problems." Judge Phelps and Juror Radcliff then met outside the presence of the defendant and the attorneys. The following conversation ensued:

Radcliff: Well, since I wrote that letter I have been thinking over things

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1. See Section II.A, *infra.*

2. We review a district court's decision to dismiss a petition for writ of habeas corpus de novo. *Miles v. Prunty,* 187 F.3d 1104, 1105 (9th Cir.1999).

a little bit and I think maybe I should – see, these are some very serious charges.

Judge: They certainly are. I don't want to know how they been voted on. I don't want to know how they been voted on.

Radcliff: Certainly not, your Honor. But I can't--because of the seriousness of the charges, I can't make snap decisions. And just as in your instructions you stated to us certain things to practice in deliberations. I was beginning to feel a little burned out.

Judge: We all are.

Radcliff: Yeah.

Judge: [Y]ou are going to take off Thursday and we're going to allow that. So you think you can hold out just a little bit longer?

Radcliff: Yes.

Judge: I really appreciate it. *Otherwise, they have to start deliberations all over again with another person.*[3]

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3. California law allows for the substitution of an alternate juror after a verdict has been reached on some but not all of the counts, provided that the trial court instructs the panel to begin deliberations anew on the remaining counts. *People v. Aikens,* 207 Cal.App.3d 209, 211, 254 Cal.Rptr. 30 (1988). A juror can be substituted if he or she becomes sick, or for other "good cause," including the juror's inability to render a fair and unbiased verdict. *People v. Delamora,* 48 Cal.App.4th 1850, 1855, 56 Cal.Rptr.2d 382 (1996) (jurors cannot be excused if they are not ill or otherwise unable to perform their duties); *People v. Farris,* 66 Cal.App.3d 376, 386, 136 Cal.Rptr. 45 (1977) ("good cause" is shown if the juror is unable to "render a fair and unbiased decision").

Radcliff: That's what I understand.

(Emphasis supplied).

The next day, May 13, Judge Phelps received a note from the jury foreman, Richard Wyke ("Foreman Wyke"). Foreman Wyke wrote:

> I believe we have reached a state where we can no longer deliberate. One juror, Eve Radcliff, does not appear to be able to understand the rules as given by you. I have been approached by nearly all my fellow jurors questioning her ability to understand the rules and her ability to reason. I feel that if we continue we will end up as a hung jury, not based on facts and evidence, but one person's inability to reason or desire to be unreasonable.

Judge Phelps read the note aloud in open court, in the presence of the attorneys, the defendant, and all of the jurors. Judge Phelps then asked Foreman Wyke whether the jury was deliberating. Wyke responded that they were "just having the same conversation over the same issue time and time again." Judge Phelps asked whether the dispute was factual. Wyke responded that "[i]t basically comes down to there's a point where the rules of law, or as has been described, we just have a total difference of opinion over. I think we have a state of denial almost where its just not happening." Judge Phelps then explained:

> The juror has a right to do that, as you all know. They have a right to disagree with everybody else. But they do not have a right to not deliberate. They must deliberate and follow the rules and laws as I state it to them.

After more discussion, Judge Phelps said:

Judge: The next question I have for you, I just want two numbers and that's all. I want to know nothing else but two numbers. I'll ask you this. In your last ballot what was the ballot? *What was the count? Don't tell me for or against, just numbers.*

Wyke: I know. The last one was 11 to 1.

Judge: 11 to 1.

Judge: The one before that was 10 and 2.

Judge: *Do you think that further deliberations might help.* I think you're off tomorrow, are you not?

Wyke: Yes.

Judge: *Do you think if you take off now and come back Friday you might be able to make further progress?....*

Wyke: It comes down to interpreting.

Judge: It's been a long time for you people.

Wyke: Yes. We are getting tired of each other. It comes down to interpreting the laws as given to us, and if one person's interpretation is inflexible in their view, I don't know that it will do us any good.

Radcliff: Or different.

Judge: *Has the person been deliberating?* And discussing–

Wyke: *Yes. I'm not questioning that.* We might give it a shot and come back Friday morning. If it continues we are going to be hung.

Judge: If you do that, then *what you're saying to me is there's a possibility you could reach a verdict, but let's take a little time off. That might help? I don't think it would hurt.*

(Emphasis supplied). Jurors then began asking questions about the deliberative process and the following conversation ensued:

Radcliff: Was there something regarding morals in the instructions that you gave us?

Judge: I don't think so. No.

Radcliff: You cannot give us an interpretation of the law.

Judge: No. I cannot do that.

Radcliff: It's up to us individually to interpret the law and apply it.

Judge: What you do is--like I think what the instructions were--you apply the facts to the law and you arrive at a decision. *The law is right there,* and I think elements of the law was given to you in those instructions. They do this or not do this? Was it proven beyond a reasonable doubt? This element, this element, this element? If they did and you find unanimously they did that, you must follow the law and find them either guilty or not guilty of that charge.

(Emphasis supplied). At this point, defense counsel objected and, in a side bar, said that Judge Phelps was misstating the instructions and improperly "instructing the jury ... as to their manner of deliberation." Defense counsel then asked that Judge Phelps instruct the jury only that they are "to follow the law as I give it to you and to refrain from explaining further what that instruction might mean in practice." The prosecutor offered that Juror Radcliff's comments reflected that she was not going to follow the law. Judge Phelps overruled defense counsel's objection and instructed the jury as follows:

> Ladies and Gentlemen, the only thing I'm going to tell you right now is; once again, I told you, you'll look up in the instructions paraphrasing it, I think I'm using the correct words: you're the sole judges of the facts. You determine the facts. You then apply the law to those facts as I state it to you, and you must accept and follow the law. You can't make up your own law. You must accept and follow the law as I state it to you.

Judge Phelps then excused the jury until Friday.

On Friday, May 15, the jury continued its deliberations. That afternoon, Juror Radcliff submitted a second letter to Judge Phelps that read:

> Due to the public beating in the jury box I experienced Wednesday, and the beatings I experience in the deliberation room from other jurors, I am again submitting a request to be dismissed from continuing on this jury.
>
> I now am struggling with a feeling of distrust and disrespect from the other jurors, borne out of the letter that was submitted to you, regarding my so-called "refusal" to accept or agree with the other jurors' thinking.
>
> I did not know *anything* about the letter that the other jurors/foreman submitted to you regarding me. As I result I find it difficult to continue in deliberations.
>
> Respectfully submitted, Eve Radcliff
>
> P.S. Though the proceedings have improved in their nature, I have reached a point of anger, and I don't believe I can be objective.

(Emphasis in original). After reading Juror Radcliff's second letter to the attorneys in chambers, defense counsel stated that Radcliff was "being driven off the jury." Judge Phelps informed counsel that he was going to call Juror Radcliff into chambers. Defense counsel objected to Judge Phelps's decision to call Juror Radcliff into chambers.[4/] Defense counsel

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4. Defense counsel additionally argued that Packer would be denied a jury drawn from a fair cross-section of the community were Juror Radcliff excused because she was one of two black people on the

said:

> Let me -- just so I can get my record clear. Let me say that I-- also *I object to this procedure* . I feel what's happening is that *Miss Radcliff is being singled out. And it's more pressure on her to either change her vote or be excused. And I think this is the process that causes that.* This causes somebody -- especially when she is going to come into chambers with just the court and counsel, puts her in a very difficult position.

When Juror Radcliff was brought into chambers, she said a "personality ething" was affecting deliberations. As she explained:

> *I didn't know about the letter that they submitted to you until like a minute and a half before we went out in the box.* And then when it was read, it sounded to me like they wanted--the intent was for me--they were upset because I didn't--I wasn't--okay. I think if I recall correctly something like, refuses to understand our thinking, or refuses to accept our line of reasoning, or refuses to accept the law. I think that's what they said or something like that. And I took that to mean that things weren't going the way that they were supposed to go, because at that point I was giving them responses, you know. *We were deliberating, I thought, but they felt that they weren't getting from me the type of responses that they wanted* because I didn't see what they were saying....

(Emphasis supplied). After Judge Phelps asked Juror Radcliff whether she was continuing to deliberate, she explained that she was trying, but said "[i]t's not to their satisfaction, that's what part of the problem is." Judge Phelps said: "Two weeks is a long, long time, it is, and I appreciate that. Okay. I think I understand. Thank you very much." Juror Radcliff returned to the jury room.

Judge Phelps then called in Foreman Wyke to meet with him and

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jury.

the attorneys. Judge Phelps asked Wyke: "is the position that you have reached in your deliberations that you can't go any further or do you think that--how do you feel about it?" Wyke explained their current deliberations process and repeatedly confirmed that Juror Radcliff was continuing to deliberate. Wyke was excused from Judge Phelps's chambers, and the jury continued to deliberate.

At the end of that day the jury was excused until Tuesday, May 19. On the morning of May 19, Juror Radcliff wrote Judge Phelps again, "requesting to speak with [the Judge] alone, in the presence of a court reporter only, if possible." Judge Phelps did not meet with Juror Radcliff.[5] The jury rendered a guilty verdict on the attempted murder charge late in the afternoon of May 19, and was then excused for the day. Early in the morning of May 20, the jury rendered a guilty verdict on the murder charge.

B. Leg Brace Claim

The day after the jury was sworn, the Sheriff's Department requested that Packer wear a leg brace underneath his pants during trial. The leg brace locked in a straight position when the wearer stood, was worn under one pant leg, and attached with velcro to the thigh and calf.

At the Sheriff's Department's request and over defense counsel's objection, Judge Phelps held an in camera hearing to review the evidence supporting the request. During the in camera hearing, Sergeant Fogerty and two Deputies, Leibrich and McCarthy, explained that they sought the leg brace because James "Doc" Holliday ("Holliday"), one of Packer's prospective witnesses, was a "very high security risk." Sergeant Fogerty explained, under oath:

> I received some information from Deputy Chaffin from the Security Unit yesterday that our Special Investigations Bureau

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5. In another handwriting, at the bottom of the note, was written: "request cancelled at 9:25 a.m." It is unclear from the record who canceled the request.

> has information that somebody connected with Holliday has said that when he gets to L.A., that stuff is going to happen. He's got nothing to lose. He wants out. He's a high escape risk.

Judge Phelps asked how this information applied to Packer. Deputy McCarthy explained, in an unsworn statement, that:

> James Holliday's wife has had communications with Packer, and that the information is that the communication between the two of them was: "I'll see you in Los Angeles, and that that's when its going to happen." Now, what we're trying to do now is establish exactly who the source is of that information, and that's the part that we don't want to disclose in court.[6]

Finally, the Sheriff's Department reported--during the in camera hearing and, at Judge Phelps's request, in open court--that they also sought a leg brace because Packer had a "special handling card" at the county jail, which was described as "a description of an inmate's possible potential problems of some sort," and because Packer had caused "some major disturbances" including "gang fights" while in custody.

Defense counsel countered that the only prison disturbance Packer had been involved in was in 1982, while Packer was in custody on another case, and that Packer was ultimately acquitted of charges arising out of that disturbance. Packer also testified in opposition to the use of the leg brace. Packer challenged the Sheriff's Department's characterization of his conduct while in custody and testified that, in his experience, restraints "definitely inhibit[] one's ability to function, to communicate ... [, and] to concentrate."

Judge Phelps ordered Packer to wear the leg brace during trial.

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6. Deputy McCarthy's information is contradicted by Packer's undisputed declaration that Holliday's wife was in federal custody at the time the alleged "communication" occurred between Packer and Holliday's wife.

Judge Phelps found that the leg brace was necessary based upon testimony received at the in camera hearing and the testimony in open court, and concluded that the leg brace would not compromise the integrity of the proceedings. Judge Phelps explained:

> [T]he leg brace will not be visible to the jury; will not impede communications with his lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant; and would not be -- he will be seated before the jury enters and remain seated until the jury leaves. If the defendant chooses to take the stand, he'll be on the stand before the jury enters and remain on the stand until after the jury leaves.

As a result of the leg brace, Packer was required to remain seated at all times and was, therefore, unable to stand when the judge and jury entered the courtroom. Holliday was never called as a witness.

II. Discussion

A. Exhaustion

The state waived its argument that Packer did not exhaust his claims in state court by failing to raise the issue before the district court. *Brown v. Maas*, 11 F.3d 914 (9th Cir. 1993) (per curiam). The state did argue that Packer failed to exhaust claims in his initial federal habeas petition. The district court found that one claim in Packer's initial petition was unexhausted, and Packer then filed an amended habeas corpus petition in which he deleted the one unexhausted claim. The state never raised the failure to exhaust claim with respect to Packer's amended habeas petition. Accordingly, the state's exhaustion claim is waived. Regardless, Packer did exhaust his claims. Packer's Petition for Review, though succinct, "'fairly presented' . . . the 'substance' of his federal habeas corpus claim[s]" to the California Supreme Court. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (quoting *Picard v. Connor*, 404 U.S. 270, 277-78 (1971)).

B. Merits

1. Packer's Fourteenth Amendment due process rights were violated because there is a strong likelihood that Judge Phelps's coercive statements and actions during the jury's deliberations caused Juror Radcliff to change her vote.

[1] A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or were "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts.[7/] 28 U.S.C. § 2254(d). Under the "contrary to" clause, a state court's decision is contrary to Federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard,* 234 F.3d 1072, 1077 (9th Cir.2000); *see also Williams v. Taylor,* 529 U.S. 362, 405-07, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Lajoie v. Thompson,* 217 F.3d 663, 667 (9th Cir.2000); *Tran v. Lindsey,* 212 F.3d 1143, 1150 (9th Cir.2000).

[2] Here, Packer's juror coercion claim is governed by Federal law first set forth in *Jenkins v. United States,* 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) and expanded upon in *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).[8/] Coercive statements from the judge to the jury result in a denial of the defendant's right to a fair trial and an impartial jury. *Lowenfield,* 484 U.S. at 241, 108 S.Ct.

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7. Packer's petition is governed by the standards of 28 U.S.C § 2254 because his habeas petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act, the statute which enacted the current standards governing the granting of the writ of habeas corpus.

8. *See also Brasfield v. United States*, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926); *Burton v. United States,* 196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482 (1905).

546. In order to determine whether the judge's comments were impermissibly coercive, the court must evaluate them "in [their] context and under all the circumstances." *Id.* at 237, 108 S.Ct. 546 (quoting *Jenkins,* 380 U.S. at 446, 85 S.Ct. 1059). The fact that Supreme Court law sets forth a fact- intensive inquiry to determine the extent of the statements' coerciveness "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams,* 529 U.S. at 391, 120 S.Ct. 1495 (stating this in regard to *Strickland*'s case-by-case approach); *see also Fisher v. Roe,* 263 F.3d 906, 914 (9th Cir.2001) (holding Supreme Court law "clearly established" because Supreme Court "set forth a working constitutional standard by which to evaluate [the claim at issue]"). Therefore, the applicable legal principles prohibiting juror coercion and the framework of the totality of circumstances test were "clearly established" for purposes of § 2254(d)(1).

[3] Because the California Supreme Court denied petitioner's habeas petition without comment, we look to the last reasoned decision of a state court as the basis of the state court's judgment. *Shackleford v. Hubbard,* 234 F.3d 1072, 1079 n. 2 (9th Cir.2000); *see also Ylst v. Nunnemaker,* 501 U.S. 797, 803-04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, the last reasoned decision of the state court, the California Court of Appeal's unpublished opinion,[9/] failed to cite to any federal law, much less the controlling Supreme Court precedents. Moreover, the court failed to apply the totality of the circumstances test as required by *Lowenfield* and *Jenkins.* Rather than evaluating the totality of the circumstances under which the judge's actions and comments occurred, as required by *Lowenfield* and *Jenkins,* the California Court of Appeal simply mentioned three particular incidents in its analysis and considered each of them separately, finding no reversible error in any of the following: (1) Judge Phelps's statement to Juror Radcliff, at the May 12 conference in chambers, "that deliberations would have to begin anew if [Radcliff] were excused"; (2) Judge Phelps's failure to further clarify the law in light of the instructions given on May 12; or (3) Judge

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9. *See People v. Jordan, et al.*, No. A958712 (Ca. Ct.App. filed Apr. 13 1995).

Phelps's "urging the jury to consider the matter further with the view to reaching an agreement" on May 13. The California Court of Appeal failed to consider the cumulative impact of these three incidents, as well as the cumulative effect of several other coercive judicial actions and statements in this case.[10/]

[4] In addition to failing to apply controlling Supreme Court law, the state court made an explicit statement of law that is contrary to Supreme Court precedent. The California Court of Appeal stated that "there is nothing improper in urging the jury to consider [a case] further with the view to reaching an agreement as long as the language used does not coerce a particular type of verdict." However, the Supreme Court has held a judge's instructions to be coercive simply because it coerced *a* verdict. The error lies in simply pressuring the jurors to arrive at *some* verdict, not in urging the jury to reach a particular verdict. *See Gypsum Co.*, 438 U.S. at 461, 98 S.Ct. 2864 (holding reversible error when judge implied that he wanted the jury to reach a verdict "one way or the other"); *Jenkins,* 380 U.S. at 446, 85 S.Ct. 1059 (holding reversible error when judge told the jury, "you have got to reach a decision in this case"). Thus, the state court's decision was contrary to clearly established Supreme Court law, not only because it failed to apply the governing law, but also because its partial rationale directly

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10. Significantly, the court does not even mention in its analysis that Judge Phelps inquired about the breakdown of the jury and, after learning that it was first ten to two and then eleven to one, directed the jury to return to its deliberations. *See Lowenfield,* 484 U.S. at 239- 41, 108 S.Ct. 546; *Brasfield v. United States,* 272 U.S. 448, 449, 47 S.Ct. 135, 71 L.Ed. 345 (1926); *Burton v. United States,* 196 U.S. 283, 307, 25 S.Ct. 243, 49 L.Ed. 482 (1905). The state court also failed to consider the following critical facts: (1) Judge Phelps knew that Radcliff was the sole dissenting juror prior to his instructing the jury to keep deliberating; and (2) Judge Phelps's action of reading the note from Foreman Wyke out loud in front of the jury and identifying juror Radcliff by name.

contradicted Supreme Court precedent.[11/] *See Campbell v. Rice,* 265 F.3d 878, 889- 90 (9th Cir.2001); *Lockhart v. Terhune,* 250 F.3d 1223, 1229, 1232 (9th Cir.2001); *Shackleford,* 234 F.3d at 1078; *McClain v. Prunty,* 217 F.3d 1209, 1223 (9th Cir.2000).

[5] However, the petitioner is not entitled to habeas relief unless the California Court of Appeal both failed to apply clearly established Supreme Court law and reached an erroneous result that warrants the issuance of a writ. *See Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Given our conclusion that the state court failed to apply clearly established Federal law, we must now determine whether its decision constituted error and if so whether the error had a substantial or injurious effect on the verdict. *See id.* Our first task is to look to Supreme Court case law and our own cases (and in appropriate instances those of other circuits), and apply them in the ordinary course.[12/] In the case before us, our analysis of the applicable federal law compels us to conclude that the judge's statements were impermissibly coercive.

[6] Applying Supreme Court law, we have found judges' comments to be unduly coercive and violative of defendants' due process rights in circumstances far less coercive than those present here. In *Jiminez v. Myers,* 40 F.3d 976 (9th Cir.1993), the trial judge met twice with a deadlocked jury. *Id.* at 978-79. In the first meeting, the judge asked how many votes had been taken, how the breakdown of the votes began and ended, and whether there had been any "movement." *Id.* at 979. After

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11. In fact, in this case the state court failed even to consider whether a federal constitutional violation occurred, as the petitioner had urged; instead it addressed only issues of state law.

12. Unlike in those post-ADEPA § 2254 cases in which the state court *applied* the controlling federal law but the petitioner urges that the application was unreasonable, here the state court *failed to apply* the controlling Federal law, and so the result it reached need not be clearly erroneous in order for a writ to issue; the fact that the result is erroneous is sufficient, so long as the *Brecht* standard is met.

the foreman replied that there was "movement," the judge returned the jury to its deliberations. *Id.* After further deliberations, the jury met again with the judge and informed him that it was divided eleven to one. *Id.* The judge noted that there had been "substantial movement" and sent the jury back to deliberate. *Id.* Less than two hours later, the jury returned with a unanimous verdict. *Id.*

We concluded in *Jiminez* that the trial court's comments and conduct "amounted to giving the jury a de facto *Allen* charge."[13] *Id.* at 980. In support of this conclusion, we observed:

> In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, *the judge's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict,* and the hold-out juror was to cooperate in the movement toward unanimity.

Id. at 981 (emphasis supplied). Under these circumstances, we held, the judge's "failure to counter-balance the implication of its questions and comments by instructing the hold-out juror not to surrender his or her sincere convictions strongly supports the conclusion that the jury was impermissibly coerced to render a unanimous verdict." *Id.* (citation omitted).

[7] Judge Phelps's comments on May 13 amount to a "de facto *Allen* charge." *Id.* Judge Phelps asked about the jury's breakdown, learned that it had been divided ten to two but was currently divided eleven to one, and said that he would send the jurors back to deliberate if the foreman thought that "further deliberations might help" or if the jury might be able "to make further progress." Like the trial judge's

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13. An *Allen* charge "instructs the jurors to work towards unanimity and the minority to reexamine its views." *Jiminez,* 40 F.3d at 980.

approving comments about "movement" in *Jiminez,* Judge Phelps's questions to Foreman Wyke about whether further deliberations might "help" the jury to "make further progress" can only be understood to suggest approval for the apparent goal of that "progress"--a unanimous verdict. As in *Jiminez,* Judge Phelps's comments sent "a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict." *Id.*

[8] Judge Phelps's "de facto *Allen* charge" was particularly coercive because he knew that Juror Radcliff was the lone hold-out juror and Radcliff knew that he knew she was the hold-out juror. When Judge Phelps made his comments, he had read Wyke's letter in open court and learned from Foreman Wyke that the jury breakdown was eleven to one. Under these circumstances, Judge Phelps's questions about whether further deliberations would "help" the jury to "make further progress," though directed to Foreman Wyke, "could only be read by [Radcliff] as being leveled at [her]." *United States v. Sae-Chua,* 725 F.2d 530, 532 (9th Cir.1984).

> [S]he could hardly escape reasoning that the judge was not likely to believe that [s]he could persuade the opposing eleven to adopt [her] position--a position the foreman had felt to be improperly taken; and that *[s]he, individually, was being urged by the judge to reconsider [her] vote.*

id. (emphasis supplied). We have held that if a judge knows the numerical division of a jury and then gives an *Allen* charge, "reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them--that is, if the judge knew which jurors were the holdouts and each holdout juror knew that the judge knew he was a holdout." *United States v. Ajiboye,* 961 F.2d 892, 894 (9th Cir.1992). Even though Judge Phelps did not actually give an *Allen* charge, his comments had the same meaning and effect, and therefore, the comparable circumstances present here merit the same findings of coercion and error: "[s]o long as the defendant has offered facts that fairly support an inference that jurors who did not agree with the majority felt pressure from the court to give up their conscientiously held

beliefs in order to secure a verdict, we must proceed to the *Allen* charge analysis." *Weaver v. Thompson,* 197 F.3d 359, 365 (9th Cir.1999).

[9] Judge Phelps's conduct during the May 13 conference was also coercive because it humiliated Juror Radcliff unnecessarily. Judge Phelps read Foreman Wyke's letter in open court, including its references to Juror Radcliff as a juror who "does not appear to be able to understand the rules," and about whom Wyke had been "approached by nearly all [his] fellow jurors questioning her ability to understand the rules and her ability to reason." As is evidenced by Juror Radcliff's May 15 note and her comments during the meeting in chambers with Judge Phelps and the attorneys, hearing Wyke's letter felt like a "public beating" that was intended to make her change her vote. Judge Phelps allowed this "public beating" to occur by reading Wyke's letter, unabridged, in open court, and without any attempt to lessen the impact of its ad hominem attacks of Juror Radcliff.

[10] Under these circumstances, Judge Phelps's failure to give any counter- balancing instruction on or after May 13 strongly supports the conclusion that Juror Radcliff was coerced to change her vote.[14] Although Judge Phelps commented that "the juror" had a right "to disagree with everybody else" at the beginning of the conference on May 13, he immediately countered that she did not "have a right to not deliberate," told Radcliff that "[t]he law is right there" and she must "follow the law," and instructed the jurors that they "must accept and follow the law" and "can't make up [their] own law." Judge Phelps never reminded Radcliff or the other jurors of their obligation not to surrender their conscientiously held beliefs. Judge Phelps again failed to give a counter-balancing instruction on May 15, when he met with Juror Radcliff and the lawyers. A counter-balancing instruction would have been particularly appropriate under the circumstances of the meeting which, as defense counsel observed, "put[] her in a very difficult position," and was "more pressure on her to either change her vote or be

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14. Judge Phelps did give a counter-balancing instruction in the instructions he gave *before* the jury began its deliberations.

excused."[15] Given the feelings of humiliation and pressure that Juror Radcliff expressed during the May 15 conference, a counter-balancing instruction would undoubtedly have been welcomed.

[11] The Supreme Court has instructed that, where the jury break down is eleven to one, "the most extreme care and caution [are] necessary in order that the legal rights of the defendant should be preserved." *Burton v. United States,* 196 U.S. 283, 307, 25 S.Ct. 243, 49 L.Ed. 482 (1905). Judge Phelps did not exercise the care and caution required to preserve Packer's due process rights. One day after Judge Phelps had encouraged Juror Radcliff to remain on the jury despite her request to be excused, Judge Phelps read Foreman Wyke's letter in open court, in which Wyke described Radcliff as a juror who was unable to "understand the rules" and "reason." Judge Phelps then asked about the jury break down, and, learning that the breakdown was eleven to one, indicated that the jury should continue deliberating if it would "help" or allow the jury to "progress" without ever providing a counter-balancing instruction that Juror Radcliff should not abandon her conscientiously held views. During the May 15 conference, Judge Phelps learned that Juror Radcliff felt that she had been "beaten" during the May 13 meeting and was feeling pressured by the other members of the jury to join the majority, but Judge Phelps again failed to give a counter-balancing instruction that Radcliff should not surrender her conscientiously held beliefs.

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15. The dissent contends that because defense counsel did not object to the judge's allowing the deliberations to continue with Juror Radcliff on the jury *after* the May 15 meeting, Packer should not now be able to argue that Juror Radcliff was coerced. However, there is no precedent that suggests that a defense attorney's desire to have a particular juror remain on the jury renders a judge's coercive statements to the jury harmless. Indeed, such a desire may make the need for a counter-balancing instruction even greater. Here, although defense counsel did argue that Radcliff should remain on the jury, he also urged that she not be pressured to change her vote and that the judge not meet privately with her in his chambers.

[12] In sum, the California Court of Appeal's decision was "contrary to ... clearly established Federal law" because it failed to apply clearly established Supreme Court law. 28 U.S.C. § 2254(d). After examining the relevant federal juror coercion cases, we hold that the state court's decision was erroneous: the judge's actions and statements were, as a whole, and under all of the circumstances, impermissibly coercive and resulted in a denial of Packer's constitutional right to a fair and impartial jury. Because the judge's coercive actions affected the verdict, the error manifestly had a "substantial and injurious effect." *Brecht,* 507 U.S. at 637, 113 S.Ct. 1710. We therefore reverse the district court's denial of the writ of habeas corpus and remand with instructions to grant the writ.

2. Although Packer's due process rights were violated when Judge Phelps ordered Packer to wear a leg brace during trial, Packer is not entitled to relief because the error was harmless.

Although the Due Process clause of the Fourteenth Amendment generally protects a defendant's right to appear at trial without shackles or other physical restraints, a trial judge's decision to restrain a defendant at trial is not unconstitutional per se. *Illinois v. Allen,* 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The Supreme Court has held that in order to maintain the proper "dignity, order, and decorum" during court proceedings, "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id.* at 343, 90 S.Ct. 1057. Because of their potential for prejudice, however, due process requires that restraints be used only as a "last resort." *Id.* at 344, 90 S.Ct. 1057.

In this case, the only evidence supporting the Sheriff Department's application for a leg brace was unsworn, hearsay testimony regarding a potential witness's plan to do "stuff" while in Los Angeles. None of the evidence submitted at the hearing reflected that Packer was going to participate in the "stuff," and none of the evidence established that the "stuff" contemplated would cause Packer to engage in disruptive courtroom behavior or an attempt to escape. Moreover, Packer had

never attempted escape and had, for the most part, a clean disciplinary history while in custody. There were, in sum, no persuasive reasons why it was necessary to resort to restraints.

In addition, Judge Phelps never considered any alternatives less restrictive than the leg brace. In light of the fact that the evidence reflected only that "stuff" might happen if and when Holliday appeared as a witness, it would have been sensible to wait until Holliday was, in fact, called as a witness to impose any physical restraint. It would have been more sensible still to impose a physical restraint on Holliday, who was the flight risk, instead of Packer. Particularly in light of the fact that Holliday was never called as a witness at Packer's trial, Judge Phelps's action was unwarranted. Clearly, in this case the imposition of physical restraints was not a "last resort."

Nevertheless, Packer is not entitled to habeas relief on this claim because he cannot show prejudice resulting from the leg brace. *Duckett v. Godinez,* 67 F.3d 734 (9th Cir.1995); *Castillo v. Stainer,* 983 F.2d 145, 149 (9th Cir.1992). None of the jurors who were interviewed after trial remembered seeing the leg brace on Packer. *See Castillo,* 983 F.2d at 149 (shackling was harmless error because defendant wore waist chain that could not be seen by the jury); *Jones,* 899 F.2d at 885 (no prejudice when defendant's handcuffs were hidden by his shirt or jacket at all times). Although Packer argues that the leg brace impeded his ability to participate in his defense, he has not shown that his alleged inability to contribute to his defense had a " 'substantial and injurious effect or influence in determining the verdict.' " *Brecht,* 507 U.S. at 623, 113 S.Ct. 1710 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). In sum, the decision to order Packer to wear a leg brace did not deny him a fair trial under the circumstances.

CONCLUSION

While we agree with the district court's rejection of Packer's leg brace claim, we reverse its decision to deny the writ of habeas corpus because we upheld Packer's juror coercion claim. We remand to the district court for the granting of the writ of habeas corpus.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

I respectfully dissent over two points.

I. The Jury Issue

The majority glosses over a key fact concerning the jury problem: Defense counsel was aware of everything the judge had said and done, but instead of moving for a mistrial, defense counsel implored the judge to keep Radcliff on the jury and stated that he had no objection to allowing the deliberations to continue.

On the afternoon of May 15, the judge informed counsel of Radcliff's "public beating" note. Defense counsel responded:

> Well, I think that she's being driven off the jury. And what she's saying here is she is angry and upset and that she's getting treated badly by the other jurors. *That doesn't make her a person that's unable to continue.* That just means that she doesn't like it.

(Emphasis added.)

The judge then stated his intention to interview Radcliff in chambers in the presence of both counsel. Before the interview began, defense counsel made it clear to the judge that he did not want to lose Radcliff as a juror:

> [DEFENSE COUNSEL]: This would be the--if you decided to excuse her, this would be the second black juror and a woman, and a black woman. I think that we would then be deprived of a fair cross-section of the community and I would ask for a mistrial.

> THE COURT: You mean based on the fact that there is a black person being dismissed?
>
> [DEFENSE COUNSEL]: Yes.

Just before the interview commenced, defense counsel objected to the procedure of singling out Radcliff for interview on the grounds that the procedure would pressure her to "change her vote or be excused." However, *after* Radcliff was questioned and had left the room, defense counsel made only one statement: "Sounded like an intelligent, articulate person who has a difference of an opinion." He no longer voiced any objection to the procedure, made no mention of any coercion or pressure, and made no motion for mistrial.

After foreman Wyke was interviewed and left chambers, the judge announced his decision to "let them continue to deliberate." The judge also briefly discussed a minor scheduling issue. After stating his rulings, the judge said to counsel, "Any objection to that?" Defense counsel replied, "No, I don't."

A party is not permitted to wait-and-see what a verdict will be, and then upon receiving an unfavorable result, raise for the first time a problem with the jury of which he was previously aware. As the First Circuit put it, "We will not allow counsel to stand by quietly and gamble on a favorable verdict, only to complain when it turns out to be otherwise." *United States v. Morris,* 977 F.2d 677, 686 (1st Cir.1992). Defense counsel knew full well how the judge had responded to the Radcliff situation, but defense counsel wanted *this* jury to continue its deliberations notwithstanding whatever the judge did, or could have done better. Had the judge declared a mistrial sua sponte based on either Radcliff's statements or the judge's own statements, the petitioner would have had a legitimate right to complain that a mistrial violated his right against Double Jeopardy. *See United States v. Shaw,* 829 F.2d 714, 719 (9th Cir.1987) (citing *Arizona v. Washington,* 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Defense counsel's faith in this jury was not altogether misplaced: The jury acquitted the petitioner of 10 of the 17 counts.

Perhaps the reason that defense counsel did not seek a mistrial is that he recognized at the time, as the California Court of Appeal and the district court did later, that the judge's comments did no harm. *After* the coercion supposedly began, the jurors deliberated for at least an *additional* eight and a half hours. This fact strongly suggests the absence of coercion. We have held that claims of jury coercion were rebutted by much shorter periods of continued deliberations following supposed coercion. *See., e.g., United States v. Daas,* 198 F.3d 1167, 1180 (9th Cir.1999) (one hour); *United States v. Plunk,* 153 F.3d 1011, 1027 *amended on denial of reh'g,*161 F.3d 1195 (9th Cir.1998), (roughly two hours); *United States v. Easter,* 66 F.3d 1018, 1023 (9th Cir.1995) (two and a half hours); *United States v. Lorenzo,* 43 F.3d 1303, 1307, n. 3(9th Cir.1995) (five and one-half hours); *United States v. Bonam,* 772 F.2d 1449, 1451 (9th Cir.1985) (90 minutes); *United States v. Beattie,* 613 F.2d 762, 766 (9th Cir.1980) (three and a half hours).

In this case, the California Court of Appeal held that "the comments made and not made by the court to the jury did not coerce a particular verdict or deny Packer any constitutional rights." The petitioner has failed to demonstrate that this decision was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, as required for relief under 28 U.S.C. § 2254(d)(1).

II. The Leg Brace

I agree with the majority that the petitioner has failed to show that he was prejudiced by having to wear a leg brace under his clothing. However, I cannot agree with the portion of the opinion that says that the petitioner's rights were violated by his having to wear the brace to begin with. A trial judge has wide discretion to decide whether public safety considerations warrant increased security measures. *See Morgan v. Bunnell,* 24 F.3d 49, 51 (9th Cir.1994). The California Court of Appeal reviewed the trial court's hearing on the matter and held:

> The record at the hearing ... established Packer's potential for nonconforming future behavior, despite the hearsay nature of

> and unknown source of some of the information. The court thus acted within its discretion in minimizing the likelihood of courtroom disruption. The court need not wait for an escape or a violent tragedy to occur before ordering an appropriate physical restraint. The court's order was particularly appropriate in view of its finding that the "leg brace will not be visible to the jury; will not impede communications with [Packer's] lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant; and [the defendant] will be seated before the jury enters and remain seated until the jury leaves." Although after the trial Packer complained about the emotional distraction and physical discomfort of the leg brace, it was a reasonable physical restraint warranted by the circumstances revealed at the hearing and not necessarily visible by the jury.

The petitioner has not shown that the Court of Appeal's decision on this point was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).

APPENDIX D

FILED
CLERK, U.S. DISTRICT COURT
OCT 23 2000
CENTRAL DISTRICT OF CALIFORNIA
BY [INITIALS] DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM PACKER, Petitioner, v. DON HILL, WARDEN, et al., Respondents.	No. CV 96-04957-HLH (MAN) JUDGMENT

IT IS ADJUDGED that the above-captioned action is dismissed with prejudice.

DATED: Oct 23, 2000.

[Signature]
HARRY L. HUPP
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
CLERK, U.S. DISTRICT COURT
OCT 23 2000
CENTRAL DISTRICT OF CALIFORNIA
BY [INITIALS] DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM PACKER, Petitioner, v. DON HILL, WARDEN, et al., Respondents.	No. CV 96-04957-HLH (MAN) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. 636, the Court has reviewed the Amended Petition, all of the records herein, the Amended Report and Recommendation of United States Magistrate Judge, and Petitioner's objections, including the documents appended to the Objections as Exhibit A. The Court accepts and adopts the Magistrate Judge's Amended Report and Recommendation.

IT IS ORDERED that Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Amended Report and Recommendation, and the Judgment herein on counsel Petitioner and counsel for Respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Oct 23, 2000.

[Signature]
HARRY L. HUPP
UNITED STATES DISTRICT JUDGE

APPENDIX F

FILED
CLERK, U.S. DISTRICT COURT
SEP 29 2000
CENTRAL DISTRICT OF CALIFORNIA
BY [INITIALS] DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM PACKER, Petitioner, v. DON HILL, WARDEN, et al., Respondents.	No. CV 96-04957-HLH (MAN) AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Amended Report and Recommendation is submitted to the Honorable Harry L. Hupp, United States District Judge, pursuant to the provisions of 28 U.S.C. S 636 and General Order 194 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner, a California state prisoner represented by counsel, filed a "Petition For Writ Of Habeas Corpus By A Person In State Custody," pursuant to 28 U.S.C. S 2254, on July 16, 1996 ("Petition"). On October 11, 1996, Respondents filed their Return, and asserted that the Petition should be dismissed for failure to exhaust available state remedies. On November 26, 1996, Petitioner filed his Traverse. On January 27, 1997, Petitioner filed an "Amended Petition For Writ Of Habeas Corpus By A

Person In State Custody" ("Amended Petition").[1/] Respondents filed a Supplemental Answer on May 5, 1997, and Petitioner filed a Traverse to the Supplemental Answer on June 18, 1997.

On September 29, 1998, Petitioner requested an evidentiary hearing, in this action, pursuant to Rhoden v. Rowland, 154 F.3d 1034 (9th Cir. 1998) ("Rhoden I"), opinion later withdrawn and superseded by 172 F.3d 633 (9th Cir. 1999) ("Rhoden II") ("for the purpose of presenting evidence that some of the jurors saw the leg brace that Petitioner wore during his state trial. On November 4, 1998, Petitioner withdrew his evidentiary hearing request, conceding that such evidence apparently does not exist.[2/]

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1. This action previously was assigned to United States Magistrate Judge Rosalyn M. Chapman. On December 13, 1996, Magistrate Judge Chapman issued a Report and Recommendation, in which she recommended that the Petition be dismissed without prejudice for failure to exhaust state court remedies with respect to Petitioner's claim based on the ex parte and in camera nature of a hearing regarding the wearing of a leg brace (discussed infra) . By Order dated January 29, 1997, Magistrate Judge Chapman withdrew her Report and Recommendation after Petitioner requested leave to amend the Petition and to delete the unexhausted claim. By Order of July 31, 1997, this case was transferred to United States Magistrate Judge Margaret A. Nagle.

2. Petitioner's counsel (Monica Knox) filed a declaration ("Knox Decl."), in which she discussed the results of an investigator's interviews of most of the jurors from Petitioner's trial. None of the jurors who were interviewed recalled seeing the leg brace on Petitioner. (Knox Decl. at 2.) The foreman recalled seeing "leg irons" worn outside Petitioner's pants and around his ankles; however, given that was not the type of restraint Petitioner wore at trial, Petitioner's counsel conceded that the foreman 'is apparently mistaken." (Id.) Petitioner's counsel stated that she did not believe that she could present evidence at a hearing to show that the jurors at Petitioner's trial were aware that he had been restrained. (Id. at 3.)

On November 30, 1999, the Court issued a Report and Recommendation, recommending that the Amended Petition be denied and dismissed with prejudice. On December 15, 1999, Petitioner filed his Objections to the Report and Recommendation. Pursuant to Rule 3.2.11 of the Local Rules Governing Duties of Magistrate Judges, the Court, upon consideration of Petitioner's Objections, now issues an Amended Report and Recommendation. For the reasons set forth herein, it is again recommended that the Amended Petition be denied and that this action be dismissed with prejudice.

PRIOR PROCEEDINGS

On May 20, 1992, in the Los Angeles County Superior Court, Petitioner was convicted by a jury of one count of second degree murder (California Penal Code ("P.C.") § 187), one count of attempted murder (P.C. §§ 664/187), two counts of attempted robbery (P.C. §§ 664/211) and, two counts of assault with a deadly weapon (P.C. § 245). (Return, Ex. A; Clerk's Transcript Vol. IV, lodged by Respondent on May 5, 1997 ("CT"), at 1037-1055.) The jury also found to be true allegations that Petitioner personally used a firearm on all counts and personally inflicted great bodily injury on a non-accomplice on one count. (Id.) Petitioner was sentenced to prison for a total of 40 years and 4 months to life. (Return, Ex. A at 41; CT at 1166.)

Petitioner appealed his conviction and sentence. On April 13, the California Court of Appeal for the Second Appellate District, unpublished opinion, affirmed the judgment. (Return, Ex. B at 59.) Petitioner sought review in the California Supreme Court, which summarily denied review on July 12, 1995, without citation to authority. (Id. at 44.)

PETITIONER'S CONTENTIONS

Petitioner raises four claims for relief in this Court:

1. The trial court violated Petitioner's Sixth and Fourteenth Amendment rights by coercing the jury to reach a verdict. (Amended

Petition at 10.)

2. Petitioner's Fourteenth Amendment right to be present at all trial proceedings, and his Sixth Amendment right to the assistance of counsel, were violated when the trial court held conferences with jurors in Petitioner's absence. (Amended Petition at 25.)

3. The trial court violated Petitioner's Sixth and Fourteenth Amendment rights by requiring him to wear a leg brace during trial. (Amended Petition at 40.)

4. Petitioner's right, under the Fifth, Sixth and Fourteenth Amendments, to be tried by the jury first impaneled was violated when the trial court excused a juror without good cause. (Amended Petition at 53.)

DISCUSSION

I. The Governing Standard of Review

Federal habeas corpus relief is available to a state prisoner only if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §§ 2241, 2254. The Amended Petition, which relates back to Petitioner's original filing date of July 16, 1996, clearly is subject to the amendments to the federal habeas corpus statutes contained in the "Antiterrorism and Effective Death Penalty Act" ("AEDPA"). See, e.g., Duhaime v. Ducharme, 200 F.3d 597, 600 n.3 (9th Cir. 1999) (a habeas petition filed after April 24, 1996, is governed by 28 U.S.C. § 2254, as amended by the AEDPA. The AEDPA imposes additional restrictions on the granting of habeas relief to state prisoners with respect to any claim adjudicated on the merits in state court. In such circumstances, the writ "shall not be granted" unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the evidence presented in the State court proceeding.

28 U.S.C, § 2254(d). See also Williams v. Taylor, ____ U.S. ____, 120 S. Ct. 1495, 1523 (2000).

It is clear that a state court decision cannot be overturned on federal habeas review merely because it conflicts with Ninth Circuit precedent on a federal constitutional issue. The Supreme Court in Williams conclusively opined that "§ 2254(d) (1) restricts the source of clearly established law to this Court's Jurisprudence". 120 S. Ct. at 1523. See also Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir 2000) ("the only definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court"), petition for cert. filed 69 U.S.L.W. 3156 (August 11, 2000) (No. 00-255).

In reviewing the habeas petition, "[a] federal court must presume the correctness of the state court's factual findings." Bains v. Cambra, 204 F.3d 964, 972 (9th Cir. 2000). The petitioner bears the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. 9 2254(e)(1).

On his direct appeal to the California Court of Appeal, Petitioner raised each of the four claims which are pleaded as Grounds One through Four in the Amended Petition, and the California Court of Appeal issued a written, reasoned opinion addressing each of the claims. (See Return, Ex. B at 59-93.) The California Supreme Court summarily denied his petition for review which raised these same four claims. (Id. at 44-94.) "[W]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting that same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803-804, 111 S. Ct. 2590, 2594 (1991). [3/] Accordingly, to determine the reasonableness of the California

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3. The California's summary, or "silent," denial of relief constituted a denial of Petitioner's claims on the merits. Hunter v.

Supreme Court's rulings on Petitioner's four habeas claims, this Court must analyze the opinion of the California Court of Appeal and must apply the standard of review articulated in Section 2254(d).

II. Petitioner's Juror Coercion Claim Does Not Warrant Federal Habeas Relief

By his first claim, Petitioner contends that the verdict against him was coerced, in violation of the Sixth Amendment's guarantee of a fair and impartial jury and the Fourteenth Amendment's guarantee of the right to due process. (Amended Petition at 10.) In particular, Petitioner alleges that various comments made by the trial judge effectively constituted an Allen charge to the jury which had the effect of forcing a particular juror (Eve Radcliff) into rendering a guilty verdict on two counts (murder and attempted murder). (Amended Petition at 11-23.)

An Allen charge "is traditionally understood as 'an instruction to consider the point of view of others, when the jury has reached an impasse in its deliberations," United States v. Wills, 88 F.3d 704, 716 (9th Cir. 1996) (cit . om.) See Jiminez v. Meyers, 40 F. .3d 976, 979 (9th Cir. 1993), cert. denied, 513 U.S. 810, 115 S. Ct. 60 (1994) and 516 U.S. 813, 116 S. Ct. 63 (1995) (stating that an Allen charge instructs the jurors to work towards unanimity and the minority to reexamine its views). "In the archetypal *Allen* charge context, the judge instructs a deadlocked jury how to strive for a unanimous verdict. Weaver v. Thompson, 197 F.3d 359, 365 (9th Cir. 1999). Here, Petitioner concedes that the trial court's comments "were not the typical or classic *Allen* instruction." (Amended Petition at 20.) Rather, relying on the above-

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Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), cert. denied, 510 U.S. 887, 114 S. Ct. 240 (1993). That denial is presumed to rest on the same grounds as set forth in the California Court of Appeal's opinion. Ylst, 502 U.S. at 804-804, 113 S. Ct. at 2594.

4. An Allen charge derives its name from Allen v. United States, 164 U.S. 492, 17 S. Ct. 154 (1896), in which the Supreme Court approved its use.

cited Jimenez decision, Petitioner argues that the trial Judge's conduct, viewed in its totality, had the effect of constituting a "de facto" Allen charge. (Id. at 20-21) See Jimenez, 40 F.3d at 980 (finding that a trial court's comments and conduct, when viewed in the context of the particular case, constituted a "de facto Allen charge"). The court examines Petitioner's first claim in light of the following underlying matters from the record.[5]

A. The Underlying Proceedings

---

5. In Jimenez, a pre-AEDPA decision, the Ninth Circuit noted that the question of jury coercion is a mixed question of law and fact which requires de novo review on appeal. 40 F.3d at 979. However, the Supreme Court has made clear that the applicability of the AEDPA's Section 2254(d) deferential standard of review does not turn on pre-AEDPA distinctions made between questions of law, questions of fact, and mixed questions. The Section 2254(d)(1) standard applies whether the issue is a mixed question of law and fact or otherwise. See Williams, 120 S. Ct. at 1516-1521. Thus, even if this Court's review of the record with respect to Petitioner's Allen charge claim is de novo, the Court still must adhere to the Section 2254(d)(1) review standard in determining whether the state courts' rejection of this claim warrants federal habeas relief.

Here, the California Court of Appeal issued a reasoned opinion on Petitioner's juror coercion claim, with several pages of factfinding. (Return, Ex. B at 79-84.) Under Section 2254 (e) (1) that Court's "determination of factual issues is presumed to be correct. Accordingly, the Court has carefully considered the California Court of Appeal's opinion. However, Petitioner, in his Amended Petition, Traverse, and Objections, has discussed the underlying factual record at length, and draws many wholly different conclusions from that record that chose drawn by the California Court of Appeal. Accordingly, in order to adequately consider Petitioner's arguments, the Court has independently reviewed the trial record for purpose of his Juror coercion claim and, in this Section, has set forth some of the salient facts from the record, in addition to those found by the California Court of Appeal.

At the end of the day on Tuesday, May 12, 1992, the jury at Petitioner's trial already had deliberated for six days and for over 22 hours, and had returned verdicts on all but two counts. (CT at 891, 896, 900, 902, 904, and 913.)[6] At that time, Juror Eve Radcliff ("Radcliff") sent a note to the trial court requesting to be dismissed due to "health problems." (CT at 910, 913; RT at 3311A-3313A.) The trial judge noted that "the attorneys are not present, neither is the defendant," but that he was "going to consider her health problems an emergency at this time." (RT at 3311A.)

The trial judge then met with Radcliff,[7] who explained that the seriousness of the charges left her unable to "make snap decisions, and that she was beginning to feel "a little burned out." (RT at 3312A.) The trial judge reminded her that the jury would have a day off and asked if she could continue. After she agreed, the trial judge stated his appreciation and noted that, if she were unable to complete her service,

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6. Based on the record, the following appears to be the status of the jury's deliberations as of the end of the day on May 12, 1992: (1) the jury had not yet returned verdicts on Count One and Two (second degree murder and attempted murder); and (2) the jury already had reached and returned guilty verdicts on two counts of attempted first degree residential robbery, and three counts of assault with a deadly weapon, and had returned not guilty verdicts on two counts of forcible rape while acting in concert, two counts of oral copulation by force, one count of attempted first degree residential robbery, and seven counts of first degree residential robbery. (CT at 890-913, 1037-1055; Reporter's Transcript on Appeal, Vols. 1, 16 and 23, lodged by Respondents on May 5, 1997 ("RT") at 3375, 3390; Return, Ex. A, at 23-40)

7. When Radcliff met with the trial judge and he noted that there were "two counts" remaining, she corrected him, stating: "Actually, we have one. The other one is on the table. We haven't turned it in yet." (RT 3312-A.) Given subsequent events, however, it appears that there were two counts on which verdicts had not yet been reached, as of that time. In any event, whether there was only one open count or were two open counts does not change the Court's conclusions set forth infra.

"[t]hey have to start deliberations all over again with another person." (Id.) Radcliff responded, "That's what I understand," and she and the trial judge then shared a joke in response to the judge's inquiry "[i]s there anything I can do?" (Id. at 3313A.)

On the next afternoon (Wednesday, May 13, 1992), the trial judge summoned counsel and the jury after receiving a note from Jury Foreperson Wyke ("Wyke"). Wyke's note stated that: "we can no longer deliberate"; Radcliff "does not appear to be able to understand the rules as given by you"; "all my fellow jurors [are] questioning her ability to understand the rules and her ability to reason"; and he believed continuing would result in a hung jury based on "one person's inability to reason or desire to be unreasonable." (RT at 3313.) After the trial judge read the note on the record before the jury and counsel, Wyke stated that there was a disagreement among the jurors over the rules of law. (Id. at 3313-3314.) The trial judge and Wyke then engaged in the following colloquy:

> THE COURT: The juror has a right to do that, as you all know. They have a right to disagree with everybody else. But they do not have a right to not deliberate. They must deliberate and follow the rules and laws as I state it [sic] to them.
>
> Now, if they interpret the rules differently, then that's why we have a jury system.
>
> THE FOREPERSON: I think we're almost at the nondeliberating state. We might be able to get through the day, but she's exercising her right as a juror.

(RT at 3314.)

When one juror asked if the court could "clarify any of the law," the trial judge declined to do so. (RT at 3314.) The trial judge then said to Wyke that he only wanted to know "two numbers and that's all" and that he did not want to know "for or against." (Id. at 3315.) Wyke responded that the last vote was "11 to 1" and then further stated, sua sponte that

the prior vote had been "10 and 2." The trial judge then inquired of Wyke whether further deliberations might help, noting that the jurors had the next day off and that "it's been a long time for you people." (Id. at 3315-3316.)

> THE FOREPERSON: Yes. We are getting tired of each other. It comes down to interpreting the law as given to us, and if one person's interpretation is inflexible in their view, I don't know that it will do us any good.
>
> JUROR NO. 8 [Radcliff]: Or different.
>
> THE COURT: Has the person been deliberating? And discussing
>
> THE FOREPERSON: Yes. I'm not questioning that. We might give it a shot and come back Friday morning. If it continues we are going to be hung.
>
> THE COURT: If you do that, then what you're saying to me is there's a possibility you could reach a verdict, but let's take a little time off. That might help? I don't think it would hurt.
>
> FOREPERSON: Neither do I.

(RT at 3316.)

One of the jurors then inquired whether the instructions stated "something about not taking in your morals and your feelings and beliefs" or not letting "other lifestyles conflict with our decision." After noting that any such references would have occurred in the juror questionnaire or on voir dire, the trial judge stated:

> You must accept and follow the law as I tell you even though you disagree with that law. accept and follow the law as I tell you. You're required to do that.

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(RT at 3316-3318.) Radcliff then asked if there was "something regarding morals in the instructions that you gave us" and the trial judge responded "no." (RT at 3318.) She then asked, "You cannot give us an interpretation of the law?" The judge again responded "no." (Id.) Radcliff stated, "it's up to us individually to interpret the law and apply it." The trial judge responded:

> What you do is -- like I think what the instructions were -- you a [sic] apply the facts to the law and you arrive at a decision. The law is right there, and I think elements of the law was [sic] given to you in those instructions. They do this or not do this? Was it proven beyond a reason able doubt? This element, this element, this element? If they did and you find unanimously they did that, you must follow the law and find them either guilty of not guilty of that charge.

(RT at 3318-3319.)

At that point, Petitioner's counsel requested a conference with court and, out of the jury's presence, expressed concern that the trial court's comments might affect how the jurors "interpret" or "view the law." (RT at 3319.) After discussion with counsel, the trial judge agreed to cut off further discussions with the jurors regarding the above-noted juror questions and to simply advise them to determine the facts and apply the law as he stated it to them. (RT at 3319-3324.) The trial judge then advised the jury:

> You're the sole judges of the facts. You determine the facts. You then apply the law to those facts as I state it to you, and you must accept and follow that law. You can't make up your own law. You must accept and follow the law as I state it to you.

(RT at 3325.) The conference then ended.

After the Thursday, May 14, 1992, day off, jury deliberations resumed on the Friday. On that afternoon, Radcliff wrote a second note

to the trial judge, requesting to be dismissed because of the "public beating" she had received on the previous Wednesday and "the beat up [sic] experienced in the deliberation room from the jurors. (RT at 3366.) Radcliff indicated that she was feeling distress and disrespect from the other jurors" as a result of Wyke's note, although she concluded her note by stating that "the procedures have improved in their nature" but that she had "reached a point of anger," and did not believe she could be objective. (Id. at 3367.) The trial judge met with counsel outside of the presence of the jury. Over defense counsel's objection that Radcliff was being singled out and that this created pressure on her to "change her vote or be excused," the trial judge spoke to Radcliff in chambers, with counsel present, to determine whether she was able to continue deliberating. (Id. at 3370.) Radcliff indicated that she thought the other jurors were displeased with her "responses," even though she believed that the jury was deliberating. (Id. at 3371.) She noted that the problem seemed to be a "personality thing," noting "in particular" that she and another juror ("an ex cop") interpreted the law differently which "causes a lot of conflicts." (Id. at 3370-3371.) Radcliff noted that "things have improved today and that the jury was using a new system in its deliberations. (Id. at 3372.) Moreover, Radcliff indicated that she and all of the jurors were "really trying." (Id.) Radcliff, several times, stated that she was deliberating. (Id. at 3370-3373.)

The trial judge then spoke alone with Foreperson Wyke in chambers. Wyke stated that all jurors were still deliberating and that, following the day off, the jurors had attempted to resolve personality issues, and he had apologized to Radcliff for his Wednesday note. (RT at 3375-3377.) Wyke also stated that all of the jurors, including Radcliff, were deliberating. (Id.) Deliberations then resumed. The jury was given that following Monday off,[8] and reconvened and deliberated until 3:50 p.m. on Tuesday, May 19, 1992. (CT at 916.) At that tine, the jury returned its verdict on one of the final two counts remaining. (Id.)[9] The

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8. The trial court gave the jury the day off to accommodate another juror's need to attend work-related training. (RT at 3377-3378.)

9. Petitioner alleges that Radcliff sent another note to the trial judge on May 19, 2000, which requested a meeting alone with the judge and which bore a notation, in another's handwriting, that the request was canceled. (Amended Petition at 14.) Petitioner does not provide any record citation for this note, however, and the note is not contained within the record for this action. (See CT and RT, *passim*.) The minute order for May 19 also does not reference the note, unlike the references to juror notes in minute orders for other days. (CT at 917.)

following morning, the jury returned its verdict on the last count remaining. (CT at 1056.)

B. The Framework For Review

An Allen charge is not, in and of itself, a basis for federal habeas relief "An Allen charge is, on occasion, a legitimate and highly useful reminder to a jury to do its duty." United States v. Plunk, 153 F.3d 1011, 1027 (9th Cir. 1998) (quoting Rodriguez v. Marshall, 125 F.3d 739, 750 (9th Cir. 1997)). The Ninth Circuit repeatedly has opined that the use of an Allen charge must be upheld unless the record clearly shows that the charge impermissibly coerced the jury. See, e.g., Plunk, 153 F.3d at 1027; United States v. Hernandez, 105 F.3d 1330, 1333 (9th Cir. 1997); United States v. Lorenzo, 43 F.3d 1303, 1307 (9th Cir. 1995). A Court may not grant habeas relief unless it is "clear from the record" that an Allen charge was given and "had an impermissibly coercive effect on the jury." Rodriguez, 125 F.3d at 750.

The question of whether or not an Allen charge was so 'impermissibly coercive" as to warrant federal habeas relief is resolved by looking to the totality of the circumstances, i.e., a consideration of whether the state trial court's actions and statements were coercive under the totality of the circumstances. Jiminez, 40 F. 3d at 980. See also, Lowenfeld v. Phelps, 489 U.S. 231, 237, 108 S. Ct. 546, 550 (1988) (claim of improper jury coercion due to Allen charge requires review of the charge in its context and under all of the circumstances). In making this determination, the Ninth Circuit repeatedly has stated that it looks to the following four factors: (1) the form of the instruction; (2) the period of deliberation following the Allen charge; (3) the total time of

jury deliberation; and (4) the indicia of coerciveness or pressure upon the jury. See, e.g., Weaver, 197 F.3d at 365, Plunk, 153 F.3d at 1027; Wills, 88 F.3d at 717; United States v. Estacio, 64 F.3d 477, 482 (9th Cir. 1995); United States v. Cuozzo, 962 F.2d 945, 951 (9th Cir. 1992). See also United States v. Daas, 198 F.3d 1167, 1180 (9th Cir. 1999) (collapsing factors (2) and (3), so that the test is a three-part test).

C. The State Court' Conclusion That Jury Coercion Had Not Been Shown Neither Contrary To, Nor Unreasonable Application of Clearly Established Federal Law.

The California Court of Appeal noted that Petitioner complained about the trial judge's statement to Radcliff that deliberations would have to begin anew if she were excused; his failure to clarify the law in response to a juror's question; and his failure to respond to Radcliff's final note. Petitioner also asserted that the trial judge should have advised the jurors that: they should consider Radcliff's views; neither Radcliff nor the other jurors need surrender their convictions; and the court's remarks were not intended to suggest any verdict which the judge deemed appropriate. (Return, Ex. B at 82-83.) The California Court of Appeal rejected each of these claims after deciding that: the comment to Radcliff regarding deliberations beginning anew, although injecting an irrelevant factor, did not impose improper pressure on her, there was no error in the trial judge's failure to further clarify the law in light of the instructions given; and there was nothing improper in urging the jury to consider the matter further with a view to reaching agreement. The court concluded, "[T]he comments made and not made by the court to the jury did not coerce a particular verdict or deny Packer his constitutional rights." (Id. at 84.)

This Court must determine whether the California Court of Appeal's decision "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (1)[10/] The Court, thus, must determine whether the

10. In Williams, the Supreme Court made clear that the "contrary to" prong of Section 2254(d) (1) applies only to cases in which

court's decision was not only erroneous or incorrect, but objectively unreasonable as well. Williams, 120 S. Ct. 1522; see also Delgado v. Lewis, ___ F.3d ___ 2000 WL 1191040 at *5 (9th Cir. August 23, 2000).[11/]

1. It is Unclear That Plaintiff's Juror Coercion Claim Is Cognizable Under The AEDPA

As an initial matter, the Court expresses doubt as to whether Petitioner's first claim is cognizable under the AEDPA's standard of review which, in this context, provides for relief only if the state court's decision is an unreasonable application of clearly established law as determined by the United States Supreme Court. The Supreme Court has never held that a "de facto Allen charge" -- a concept invented by the Ninth Circuit -- is unconstitutional. Indeed, the highest court has never ruled that such a doctrine exists. In Jimenez, a divided Ninth Circuit panel relied on Ninth Circuit "totality of the circumstances" decisions[12/] to create the doctrine of a de facto Allen charge. 40 F.3d at 980-981. In doing so, the majority concluded that, because the "totality of the circumstances" test was well-established, the Supreme Court's decision

the state court "arrives at a conclusion opposite to that reached by" the highest court or "decides a case differently than this Court has on a set of materially indistinguishable facts." 120 S. Ct. at 1523. As neither circumstance exists here, the "unreasonable application of" prong of the AEDPA governs the Court's analysis.

11. In a series of recent cases, the Ninth Circuit has opined that this standard requires proof of "clear error" on the state court's part, i.e., that a federal habeas court must be left "with a definite and firm conviction that an error has been committed." Van Tran, 212 F.3d at 1153; see also, Delgado, 2000 WL 1191040 at *5.

12. The Ninth Circuit did note that the Ninth Circuit's "totality of circumstances" test is based on Jenkins, 380 U.S. at 446, 85 S. Ct. at 1060, and also cited to Lowenfeld, 484 U.S. at 237, 108 S. Ct. at 550. Jimenez, 40 F.3d at 980 n.2.

in Teague v. Lane, 489 U.S. 288, 109 S Ct. 1060 (1989),[13] was inapplicable. 40 F.3d at 981. In dissent, Justice Kozinski charged that the majority, through its creation of the de facto Allen charge concept, "invents a whole new doctrine," in violation of Teague. Id.[14]

The Supreme Court has made clear that law created by a federal appellate court is not "clearly established Federal law" within the meaning of the AEDPA. William, 120 S. Ct. at 1523 (Section 2254 (d) (1) "restricts the source of clearly established law to this Court's jurisprudence"); see also Van Tran, 212 F.3d. 1154 ("we may not, of course, reverse a state court's decision because it is inconsistent with a rule established by a Ninth Circuit case"). In Williams, the Supreme Court did note that the "unreasonable application" prong may encompass an unreasonable failure to apply a legal principle to a "new context." 120 S. Ct. at 1521. The Ninth Circuit recently has construed the Williams test of "objective" unreasonableness to mean that "a state court's decision can be unreasonable even if it addresses a question not previously addressed by the Supreme Court or by the lower courts." Van Tran, 212 F.3d at 1154 n. 16. Here, of course, the California Court of Appeal's decision was rendered after Jimenez was decided.

The Court is unconvinced that a state court's failure to extend the Supreme Court's decisions in Allen, Jenkins, and Lowenfeld so as to invoke the concept of a de facto Allen charge in this case can be said to constitute an objectively unreasonable failure to apply clearly established

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13. In brief, the Supreme Court's Teague opinion commonly is construed to stand for the proposition that new constitutional rules of criminal procedure will not be applied retroactively on collateral review of a final conviction. 489 U.S. at 310, 109 S. Ct. at 1075.

14. The Court notes that, in dicta, the Ninth Circuit last year cited Jimenez for the proposition that courts have applied an Allen charge analysis in circumstances where "improper coercion is implicit in the circumstances, rather than explicit in a formal instruction." Weaver, 197 F.3d at 365.

United State Supreme Court holdings[15] -- the standard required for AEDPA review. However, in light of the existence of the Jimenez decision at the time of the California Court of Appeal's decision, the Court will assume, arguendo, that a state court's failure to find the existence of an impermissibly coercive "de facto" Allen charge possibly could constitute an unreasonable application of clearly established Federal law under Section 2254 (d) (1) . The Court now will consider whether such a possibly unreasonable application occurred here.

2. Petitioner Has Not Established A De Facto Allen Charge

As noted above, Petitioner concedes that no explicit Allen charge was given at his trial. Rather, Petitioner relies upon the Jimenez "de facto Allen charge" concept as the predicate for his juror coercion claim. (Amended Petition at 20-21; see also Traverse at 13-14, indicating that Petitioner is relying upon 'the combination of comments and actions" to support his claim.) The Court is not persuaded that any such "de facto Allen charge" was given here.

Other than Jimenez, the Court is unaware of any published Ninth Circuit Court of Appeals decision which actually finds that a de facto Allen charge was implicit from the circumstances and resulted in unconstitutional coercion. In Jimenez, after almost five hours of deliberation and a jury indication of deadlock, the trial judge inquired as to the number of votes taken and the numerical movement between the first and last votes. The foreperson advised that there had been five or six votes, which had split seven-five, eight-four, nine-three, and nine-two and one. The trial judge then inquired specifically as to the movement which had occurred between the last votes and, after being advised of the specific numerical movement, stated: "Well, that s what's important to

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15. Significantly, the "totality of the circumstances" test traditionally has been applied to determine whether coercion existed as a result of the circumstances surrounding an actual Allen charge -- not to determine whether an Allen charge itself was given. Thus, in this Court's view, the majority opinion in Jimenez represents an extension and new application of the "totality of the circumstances" test.

me because of the nature of the case. I want to find out that there has been movement." 40 F.3d at 978-979. After a three-day weekend and the recommencement of deliberations, the jury again indicated a deadlock. The trial judge, after noting that he previously had asked the jury whether there had been any movement, again asked the jury the number of votes taken and the numerical movement which had occurred. After the foreperson indicated that two votes had been taken and, in response to the judge's follow-up question, advised that the latest vote had been 11-1, the trial judge stated: "So, there has been, then, substantial movement since the last time . . . . Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time." Id. at 979. The jury returned a guilty verdict at the close of that day. (Id.)

The Court in Jimenez found that, when "viewed against the backdrop of the particular circumstances of the case," the trial judge's comments and conduct amounted to the giving of a "de facto *Allen*" charge.

> After the first impasse, by eliciting the progression in the voting, determining if it was moving in one direction, expressing his approval of that progression, and telling the jury to continue its deliberations, the trial court effectively instructed the jury to make every effort to reach a unanimous verdict. In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the 'movement" toward unanimity, the court's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity.

40 F.3d at 980-981. The Court particularly noted the absence of any counter-balancing instruction that jurors are not to surrender their convictions, concluding that such a supplemental instruction was available under California law. Id. at 981 n.5.

In contrast, in Rodriguez, the Ninth Circuit denied habeas relief after rejecting a claim that a de facto Allen charge should be found based on circumstances which occurred during deliberations. The jurors had declared themselves deadlocked on four occasions over 15 days and, on day 11, the trial judge inquired into the numerical split of the jurors. As a result, he learned that the vote remained at 11-1 after five ballots. 125 F.3d at 742, 748. The Ninth Circuit rejected the petitioner's contention that this circumstance, coupled with the fact that the trial judge required the jury to continue deliberating despite repeated deadlocks, constituted a de facto Allen charge. The Court first noted that, because the claim did not rest on an actual, explicit Allen charge, the Court could not grant habeas relief unless it was "'clear from the record,'" that the alleged charge had an impermissible coercive effect on the jury. Id. at 750 (cit. om.) The Court then characterized the Jimenez decision as involving a failure by the trial judge to remind the jury of their duty not to surrender their sincerely held beliefs "while at the same time making it clear that he wished them to return a unanimous verdict." Id. Neither circumstance was found to exist in Rodriguez: the trial judge had instructed the jurors to hold onto their beliefs and, after learning of the numerical split on five ballots, made no comment and did not know whether the majority favored conviction or acquittal or the identity of the hold-out juror. Additionally, the jurors deliberated for four days after the numerical split inquiry. (Id. at 751.)

The situation in Petitioner's case is markedly different than that presented in and more akin to that in Rodriguez, albeit with some differences. Here, as in Rodriguez at the May 13 open-court conference, the trial judge simply asked the jury its numerical division after a possible impasse, a procedure noted is permissible. 40 F.3d at 981. It is likely, of course, that the trial judge was aware that Radcliff was the hold-out juror, given the nature of the foreperson's comments regarding Radcliff in his note. It is true that, as a result of the foreperson's sua sponte comment, the judge learned of movement between two votes. However, as in Rodriguez he was not aware whether the majority favored acquittal or conviction.

The repeated inquiries as to, and expressions of approval of,

movement which were held to be dispositive in Jimenez are absent here. Unlike in Jimenez, the jurors here indicated that, although an impasse was possible, further deliberations might be fruitful. Unlike in Jimenez, the trial judge did not express any approval of the jurors', vote-related movement; indeed, as in Rodriguez, he made no comment about the information. Unlike in Jimenez, there were no repeated court inquiries as to votes taken and movement, and there was no direction to go back and deliberate in the face of a judge's comment that "I want to find out that there has been movement." Here, unlike in Jimenez, the trial judge did not exhort the jurors to reach a verdict. Instead, after the foreperson sua sponte stated that the jurors "might give it a shot" and continue deliberating, the trial judge merely noted that what the foreperson seemed to be saying was that "there's a possibility you could reach a verdict" and that the time off on Thursday would not hurt. (RT at 3316.) Merely questioning a jury to determine if any progress is being made does not constitute an Allen charge. United States v. Cuozzo, 962 F.2d 945, 951 (9th Cir. 1992). Here, the trial judge merely queried the jury as to the usefulness of further deliberations, without expressing any approval or disapproval of anything.

This case is distinguishable from Jimenez in another significant respect. As noted above, no counter-balancing instruction was given in Jimenez despite, as the Court found, the availability of such an instruction under California law. Here, contrary to Petitioner's assertions, such an instruction was given. At the People's request, CALJIC 17.40 was given, which states, among other things:

> The People and the defendant are entitled to the individual opinion of each juror.
>
> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

(CT at. 1015.) Additionally, at the outset of the May 13 conference with the jurors, the trial judge, after being advised that there was a disagreement over the rules of law, stated explicitly that "[t]he juror has a right to do that, as you all know. They have a right to disagree with everybody else. . . . Now, if they interpret the rules differently, that's why we have a jury system." (RT at 3314.)

Based on the above, the Court cannot conclude that it was an unreasonable application of clearly established Federal law (as that concept is embodied in the AEDPA) to fail to find that this case presented an instance of a de facto Allen charge, as that concept was first promulgated in Jimenez. While Jimenez does not preclude finding such a de facto charge on the record before the Court, the decision certainly does not mandate such a finding. Indeed, the Ninth Circuit's subsequent decision in Rodriguez points to the opposite conclusion, i.e., that no de facto Allen charge can be found on this record. Most critically, for purposes of the governing AEDPA standard of review, there is no Supreme Court decision which mandates finding a de facto Allen charge on this record. As such, the Court cannot conclude that the state courts erred, and that such error was objectively unreasonable, in failing to find that Petitioner's constitutional rights were violated, as alleged.

3. Even If A De Facto Allen Charge Can Be Said To Have Occurred, The Totality The Circumstances Do Not Establish Coercion.

Even if the state court's, failure to find that a de facto Allen charge was given in light of the events of May 12-19, 1992 could be found erroneous, such a conclusion does not resolve Petitioner's first claim. An Allen charge in and of itself is not unconstitutional, and only presents a possible basis for habeas relief if the charge resulted in actual juror coercion. United States v. Lorenzo, 43 F.3d 1303 1307 (9th Cir. 1995). Moreover, the Ninth Circuit has opined that it must be "clear from the record," that impermissible coercion occurred before habeas relief can

be granted. Rodriguez, 125 F.3d at 750 (cit. om.). As noted above, in this Circuit, four factors must be examined in addressing the coercion question.

First, the Court must look to the form of the instruction itself, As there was no actual Allen instruction in this case, this factor does not provide any assistance in resolving the coercion question.

Second, the Court must look to the period of deliberation following the Allen charge. Petitioner contends that it was an ongoing series of events occurring on May 12-19, 1992, all of which occurred while deliberations were ongoing, which together constituted the de facto Allen charge. It is instructive to look at the length and periods of deliberations which occurred following each of the alleged instances of coercion. As discussed above, Petitioner first complains about a comment which the trial judge made to Radcliff at the end of the day on May 12, i.e., regarding starting deliberations over again with another person if Radcliff were to be excused. On the next day, May 13, the jury deliberated for approximately two and a half hours before the open court session at which the foreperson's note was read. There were no further deliberations on the day following that session. (CT at 915.) After a day off, the jurors resumed deliberations on May 15, and deliberated for approximately two and half hours before breaking for lunch and before Radcliff sent her second note to the trial judge.[16/] After the trial judge and counsel met with Radcliff that afternoon, the jurors deliberated for a little over a half hour. (CT at 916.) After the weekend and an additional day off, the jurors recommenced deliberations on May 19, and deliberated for slightly over four hours before returning a verdict as to Count 2. (CT at 917.) The jurors recommenced deliberations on the morning of May 20 and, after 12 minutes, returned a sealed verdict as to Count One, (CT at 1056.) In sum, the jurors deliberated for approximately eight and a half hours after the alleged commencement of coercion before returning a verdict as to the first outstanding count.

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16. The record indicates that the jurors spent the first hour of that period discussing "personality issues," but recommenced their deliberations at 10:00 a.m. (RT at 3372, 3375.)

Third, the Court must look at the total time of jury deliberations. Here, the jury deliberated for approximately 31 hours total -- for slightly over 22 hours before the first event alleged to constitute one of the Allen charge circumstances and for over eight hours after this event. The jury had rendered verdicts on 17 counts prior to this first alleged Allen charge event. In fact, the jury deliberated for approximately 15 and a half hours before reaching verdicts on these 17 counts, and then deliberated another approximately six and a half hours before the alleged first coercive event on May 12. The fact that the jury deliberated for an additional eight and a half hours after the alleged commencement of coercion strongly suggests that the verdict reached was the result of sincere deliberations, and not coercion. The Ninth Circuit consistently has found that much shorter periods of deliberation following an Allen charge did not indicate an impermissibly coercive effect on the jury. See, e.g., United States v. Daas, 198 F.3d 1167, 1180 (9th Cir. 1999) (one hour out of a total deliberation time of five hours); Plunk, 153 F.3d at 1027 (one and one-half hours); United States v. Easter, 66 F.3d 3d 1018, 1023 (9th Cir. 1995) (two and one half hours); Lorenzo, 43 F.3d at 1307 n.3 (five and one-half hours); United States v. Bonam, 772 F.2d at 1451 (one and one-half hours); United States v. Beattie, 613 F.2d, 762, 766 (9th Cir. 1980 (three and one-half hours). The over eight hour time period between the asserted commencement of coercion events and the jury's return with verdicts on Counts 1 and 2 does not indicate coercion, particularly when compared to the previous 15 and a half hour deliberation period for the other 17 counts.

Fourth, and finally, the Court must examine the indicia of coercion or pressure upon the jury. Petitioner contends that the events of May 12-19, 1992, when considered together, prove that Radcliff was coerced to render guilty verdicts on Counts 1 and 2. The Court has carefully considered each of Petitioner's arguments and cited authorities,[17/]

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17. The Court notes that, with the exception of Jimenez, Petitioner relies upon various Ninth Circuit decisions involving express rather than de facto Allen charges. A blind reliance on the conclusions of coercion reached in those decisions is ill-advised in this case given that here, as Petitioner concedes, there was no express Allen charge.

including those set forth in Petitioner's Objections to the Court's original Report and Recommendation. The Court also has examined each of the following alleged indicia of coerciveness, both separately and in toto, in the context of all the trial's events.

The trial court's initial comment to Radcliff, indicating that deliberations would have to begin anew if she were excused, was ill-considered and inappropriate. Indeed, the California Court of Appeal found that the remark "injected an irrelevant factor," although did not constitute "improper pressure." (Return, Ex. B at 83.) In United States v. Bonam, 772 F.2d 1449, 1450 (9th Cir. 1985), a case in which an actual Allen charge was given, the Court held that the trial court should not have indicated to the jury that if a verdict were not reached in the case would have to be retried and, thus, would cause additional expense to be incurred. The Court further noted, however, that "the addition of these comments did not necessarily make the instruction more coercive and require reversal," and declined to find jury coercion. Id. at 1450-1451. Here, the trial judge did not make any comment regarding the incurrence of additional expense. Moreover, before the judge's ill-considered comment was made, Radcliff already had stated that she could continue deliberating. The remark, in context, did not impose the kind of improper pressure on a juror who is advised that his or her dismissal will require retrial of the entire case and cause additional expense and then is asked and/or directed to continue deliberating. Accordingly, the Court does not find that the remark was impermissibly coercive on its own, although recognizing that the remark must be considered in the context of the subsequent events.

With respect to the open-court session on May 13, the trial court's inquiry into the numerical division of the jury clearly was constitutionally permissible, as long as the context of the inquiry does not suggest that jurors were coerced into changing their views as a result. See, e.g., Rodriguez, 125 F.3d at 749; Jimenez, 40 F.3d at 981; Locks,

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Coercion is more likely when jurors have been instructed with the substance of an actual Allen charge, i.e., they have been told that they should reexamine their views and/or that they must reach a verdict.

703 F.2d 403, 407 (a trial court's simple inquiry into the numerical division among the jurors, without more, was not impermissible).[18/] As discussed in the preceding section, in this case the trial court made a simple inquiry into the jurors' numerical division without asking about, or expressing approval of, movement or inquiring into how the vote started and ended. The trial judge inquired into the last ballot" count only, and specifically stated, I want to know two numbers and that's all." (RT at 3315.) The trial Judge's comment immediately following this inquiry -- which ignored the foreperson's sua sponte statement as to a prior vote and which ignored the numerical split information obtained -- indicates that his inquiry was designed to determine whether further deliberations might assist the jurors in reaching a verdict, rather than to elicit how the jurors stood on the merits of the case.[19/] Id. This type of inquiry has been expressly approved by the Supreme Court and this Circuit. Lowenfield, 484 U.S. at 240, 108 S. Ct. at 552; Rodriguez, 125 F.3d at 749. Accordingly, the trial court's inquiry into the numerical division of the jury was not, in and of itself, improperly coercive.

Petitioner, however, argues that the inquiry and the remaining trial court comments at the May 13 open-court conference were coercive because the trial judge knew that Radcliff was the hold-out juror, and Radcliff knew that the trial court was aware of her identity. In various Ninth Circuit decisions involving explicit Allen charges, the Court has

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18. In Locks, the Ninth Circuit concluded that Brasfield v. United States, 272 U.S. 448, 47 S. Ct. 135 (1926), in which the Supreme Court stated an apparent per se rule against inquiry into a jury's numerical division, represented an exercise of the Court's supervisor powers rather than a constitutionally-based holding applicable to state proceedings. Locks, 703 F.2d at 405-407. The Supreme Court has confirmed this analysis and has held that the Brasfield decision is not required to be followed when reviewing state proceedings on habeas corpus petition. Lowenfield, 484 U.S. at 239-140 n.3, 108 S. Ct. at 552 n.3.

19. Again, the record shows that the trial judge was not aware whether the 11-1 split was for or against conviction. (RT 3315-325.)

noted that, when coupled with an express Allen charge and other factors indicative of coercion, the judge's knowledge of a holdout juror's identity and the juror's awareness of that knowledge are factors that can indicate coercion. These decisions have recognized that, in such circumstances, the hold-out jurors may perceive the Allen charge as being directed at them. See e.g., United States v. Ajibove, 961 F.2d. 892, 894 (9th Cir. 1992). In support of his argument, Petitioner relies on United States v. Sae-Chua, 725 F.2d 530 (9th Cir. 1984). In Sae-Chua, the district court received a note from the foreperson, which stated that eleven jurors favored conviction but that one juror persisted in voting not guilty despite his belief that the defendant was guilty. The district court then polled the jurors in the courtroom as to whether they believed further deliberations would result in a verdict if but one juror responded affirmatively. The district court then gave an Allen charge, and the jury returned a guilty verdict several hours later. Id. at 531-32. The Ninth Circuit held that, in that circumstance, "the charge could only be read by the dissenting juror leveled at him" and that the Allen charge given was unduly coercive. Id. at 532.

Sae-Chua is factually distinguishable in several critical respects. First, and critically, the trial judge did not levy an Allen charge in this case. Second, the trial judge was not aware of whether the majority favored acquittal or conviction. Third, although the trial judge presumably knew that Radcliff was the hold-out juror, unlike in Sae-Chua he did nothing to indicate that Radcliff needed to reconsider her position. Indeed, he expressly stated that the jurors had "a right to disagree with everybody else" and that they were entitled to interpret the rules differently, although all must deliberate and follows the rules and the law as stated by the court. (RT 3314.) As discussed previously, the trial court merely questioned whether the jury was still deliberating, and whether further deliberations would help. (RT at 3312-A, 3315-16, 3372, and 3377.) After Radcliff herself and Wyke repeatedly confirmed that the jury was still deliberating, the trial judge permitted them to do so. (Id.) This conduct by the trial court, coupled with the lack of an Allen charge, did not constitute the coercive circumstances found in Sae-Chua.

Petitioner, however, vigorously complains that the trial court took

no measures to counterbalance the potential for coercion in this case. The Court disagrees. The trial court instructed the jurors with CALJIC 17.40, which explicitly admonishes the jurors that "[e]ach of you must decide the case for yourself" and "do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision." (CT 1015.) And again, when the note from Wyke was read to the jury, the trial court stated that "the juror has a right to do that . . . a right to disagree with everybody else," and "if they interpret the rules differently, then that's why we have a jury system." (RT at 3314.) Contrary to Petitioner's suggestion, no court has held that coercion must be found if no counterbalancing instruction is given at the same time as the alleged Allen instruction. The absence of such counterbalancing instruction is but one factor under the totality of circumstances test for coercion. Here, there was a counterbalancing instruction given prior to the events of May 13, and a contemporaneous reminder by the trial judge that the jurors were entitled to disagree with each other.

Petitioner also complains that the trial judge's reiteration of a jury instruction to the effect that the jurors are the sole judge of the facts, but must accept and follow the law as stated by the court (RT 3325) was a "clear 'lecture sounding in reproof,'" to Radcliff, and a direction to her to change her vote. (Amended Return at 20; Objections at 7.) Petitioner's characterization, while dramatic, is not borne out by a fair reading of the record. The situation was that a juror (Mr. Bulpitt) made certain statements indicating that the jury instructions encompassed such matters as not allowing morals, feelings, beliefs, other lifestyles, personal opinions, etc., to affect the juror's decisions and that the jurors must follow the law as given by the court and not by the attorneys. In direct response to Mr. Bulpitt's statements, the trial court then attempted to clarify the juror's duty to follow the law even if they disagree with it. As described above, Radcliff then asked a question regarding whether the instructions encompassed "morals" and whether the judge could give the jurors an interpretation of the law. (RT at 3316-3318.) The trial judge responded by again stating that the jurors must apply the facts to the law as stated for the jurors in the jury instructions. (RT at 3318-3319.) After defense counsel objected to the trial judge's comments on the ground that he had misstated the jurors' duties and after he requested that the trial

judge clarify its instructions, the trial judge simply instructed the jury, as a whole, that they are the sole judges of the facts and must apply the law to those facts and must accept and follow the law. (RT at 3319-3325.) Petitioner's characterization of these events as a lecture directed specifically at Radcliff is inaccurate.

Finally, Petitioner complains that the trial judge did not adequately respond to notes sent by Radcliff on May 15 and 19. As noted above, with respect to the alleged May 19 note, there is no evidence of any such note in the record before the Court. Petitioner alleges that the May 19 note indicates that it was canceled at 9:25 a.m., the same time jury deliberations recommenced that day. (CT at 917.) If this is so and a deliberation request was canceled, the trial judge's asserted failure to respond cannot be faulted. With respect to the May 15 note, Petitioner's characterization of the trial judge's response again mischaracterizes the record. At her meeting with the trial judge and counsel, Radcliff repeatedly indicated that she and the other jurors were deliberating and that they all were "really trying." She also indicated that the problem was "personality"-related with respect to another juror and that "things have improved today." (RT at 3370-3373.) With respect to her statement in the note that she did not believe she could be "objective," the trial judge advised counsel that, as a result of meeting with Radcliff, "I think she is very objective," a conclusion with which defense counsel readily agreed. (RT at 3373.) In the Court's view, a fair reading of the record of the trial judge's meeting with Radcliff on May 15 reveals that the trial judge did listen very carefully to her comments and concerns and then concluded that, notwithstanding the emotional tenor of her note, she was properly deliberating and could be objective. (RT at 3370-3373.)

After independently reviewing the record, the Court concludes that the totality of the circumstances does not indicate that Petitioner's verdict was coerced. Petitioner has not shown that a conclusion that an Allen charge actually was given is warranted here, much less that the jury was coerced by the matters alleged in the Amended Petition or in any of Petitioner's other filings in this case. Having considered the totality of the circumstances, the Court concludes that the state court's conclusion that the trial court "did not coerce a particular verdict" was not an

unreasonable application of clearly established Federal law as determined by the United States Supreme Court. Accordingly, the standards of Section 2254(d) have not been net, and habeas relief is not warranted as to Petitioner's first claim for relief.

III. Petitioner's Right To Be Personally Present At Trial Proceedings Was Not Violated

By his second claim, Petitioner contends that he was denied due process and his right to the assistance of counsel, under the Sixth and Fourteenth Amendments, when the trial court held five conferences with jurors in his absence. (Amended Petition at 25.)

A. The Underlying Proceedings.

On May 12, 1992, the trial court held two conferences with members of the jury in chambers. Petitioner, defense counsel and the prosecutor all were absent from these two meetings.[20/] The first, with juror Sharon Schweda ("Schweda") , concerned problems she was having with her employer as a result of her jury service. (RT at 3306A-3310A.) The trial court showed Schweda a draft of a letter to her employer and, after Schweda approved the draft, promised to leave a copy for her by the end of the day. (Id.) The second meeting on that day was that held with Juror Radcliff, as discussed supra, which was deemed by the trial court to involve a "health emergency." (Id. at 3311A-3313A.)

On May 15, the court held three separate conferences with jurors in chambers. (RT at 3366-3383.) Counsel, but not Petitioner, were present at each of 'these meetings. The first conference was with Radcliff, who had made another request to be dismissed from the jury, as described in Section II above. (Id. at 3370-3373.) The trial court discussed her request and the progress of deliberations. (Id.) As also discussed above, the judge and counsel then met with the foreperson (Wyke) and discussed

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20. In a previous conference, however, both the prosecutor and Petitioner's counsel had consented to the trial court meting with Juror Schweda without their presence. (RT at 3310.)

the progress of deliberations with him. (RT at 3374-3377.) The third conference on that day was with Schweda regarding the continuing problem she was having with her employer and her question regarding her "rights" as a juror with respect to her employment situation. (Id. at 3378-3383.)

c. The Framework For Review

Under clearly established United States Supreme Court precedent, a criminal defendant has the constitutional right to be present at those stages of trial when "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667 (1987) (quoting, Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 332 (1934)). See, also, Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 455 (1983) (right to be present attaches "at all critical stages of the trial.") However, the right does not attach "'when [his] presence would be useless, or the benefit but a shadow." Kentucky v. Stincer, 482 U.S. at 745, 107 S. Ct. at 2667 (quoting Snyder, 291 U.S. at 106-07, 54 S. Ct. at 332); see also United States v. Gagnon, 470 U.S. 522, 527, 105 S. Ct. 1482, 1484-85 (1985) (constitutional right of presence not implicated if defendant cannot do or gain anything by being present).

This "presence" right stems from two sources: the Sixth Amendment right to confront witnesses or evidence and the Fourteenth Amendment right to due process. Kentucky v. Stincer, 482 U.S. at 736-739, 745, 107 S. Ct. at 2662-2664, 2667. See also Gagnon, 470 U.S. at 526, 105 S. Ct. at 1484. Here, the juror conferences in question did not involve witnesses or evidence against Petitioner. Thus, no Confrontation Clause-based "presence" right is implicated. United States v. McCoy, F.3d 495, 496 (7th Cir. 1993).However, Petitioner's due process right is implicated by his claim.[21/]

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21. Petitioner also contends that he was deprived of his Sixth Amendment right to be represented by counsel when the trial judge held the two juror conferences on May 12 outside the presence of his counsel. (Amended Petition at 26 n.10; Traverse at 29, n. 23.) Petitioner's

Under the Due Process Clause, a defendant has no constitutional right to be present at an ex parte conference in chambers with a juror, absent a showing that his absence undermined the fairness of the proceedings."[22/]

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contention is meritless. The Cronic rule, on which Petitioner relies, is that a Sixth Amendment violation occurs when there is a "complete denial of counsel" at a "critical stage of . . . trial." United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984). For the reasons discussed below, it is clear that neither May 12 conference involved a "critical stage" of Petitioner's trial, as that concept has been defined by the Supreme Court, requiring either his or his counsel's presence. See, e.g., Gagnon, 470 U.S. at 527, 105 S. Ct. at 1484. Moreover, as to the Schweda meeting, as noted above, the trial judge gave counsel the opportunity to participate, and both counsel agreed that the meeting could go forward without their presence. As to the Radcliff meeting, the trial court properly deemed the situation to involve an emergency, due to Radcliff's assertion of health problems. The Court cannot accept Petitioner's implicit claim that the trial judge should have ignored and/or delayed addressing a juror's apparent illness, at the end of the trial day because his counsel was not available.

22. The Court notes that Petitioner's reliance on Rogers v. United States, 422 U.S. 35, 95 S. Ct. 2091 (1975), and Shields v. United States, 273 U.S. 583, 47 S. Ct. 478 (1927), as the principal bases for his claim is misplaced. (Amended Petition at 25; Traverse at 26; Objections at 12.) The Rogers decision was based on Rule 43 of the Federal Rules of Criminal Procedure, which provides that a criminal defendant has the right to be present at every "stage of the trial." 422 U.S. at 39, 95 S. Ct. at 2094. Rule 43, however, only applies to federal trials. The Shields decision also did not involve a constitutionally based "presence" claim, such as that asserted here. 273 U.S. at 587, 47 S. Ct. at 479. Moreover, the Supreme Court's subsequent Gagnon decision makes clear that any current reliance upon Shields for the proposition that a defendant has an absolute right to be present at any and all communications between judge and jury is unfounded.

> [T]he mere occurrence of an ex parte communication between a trial judge and a juror does not constitute deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror. . . .

Gagnon, 470 U.S. at 526, 105 S. Ct. at 1484 (quoting Justice Stevens's concurring opinion in Rushen, 464 U.S. at 125-126, 104 S. Ct. at 459); see also United States v. Olano, 62 F.3d 1180, 1190-1191 (9th Cir. 1995) (a judge's private meeting with a juror in chambers failed to establish a constitutional violation under the Fifth or Sixth Amendment).

For purposes of Petitioner's second claim, the governing test is as follows:

> "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

Gagnon, 470 U.S. at 1526, 105 S. Ct. at 1484 (quoting Snyder, supra).

C. The State Court's Conclusion That "Presence Error" Had Not Been Shown Was Neither Contrary To, Nor An Unreasonable Application Of, Clearly Established Federal Law.

In the California court, Petitioner raised the same contentions made here.[23/] The California court of Appeal rejected these contentions:

> [A]ll of the conferences complained of either involved requests for relief from jury service on grounds of personal hardship, external employment-related, problems, or the

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23. On state appeal, Petitioner also argued that he was entitled to be present at a sixth conference, involving Juror Ferguson. (Return, Ex. B at 85.) Although his fourth federal habeas claim involves the dismissal of that same juror, his "presence" error claim, as asserted in this Court, does not claim error based on his absence from a conference with Ferguson.

> continuation of deliberations. All the incidents complained of thus had no reasonable, substantial relationship to any specific substantive legal issue or to Packer's ability to present a defense.
>
> Packer complains that his absence from the conferences complained of deprived him of the ability to consult with counsel, bring unspecified factors to counsel's attention or give unspecified advice or suggestions to counsel. Packer further urges that his mere presence would have served the psychological function of keeping the jurors more honest and candid and ensuring their resolve. However, such speculation unfairly assumes certain inadequacies by defense counsel and the jurors, of which there is no evidence in the record. Accordingly, even assuming any error, it was harmless beyond a reasonable doubt.

(Return, Ex. B at 86-87.)

Petitioner argues that the state court's decision was erroneous because he had a constitutional right to be present at all" communications with the jury. (Amended Petition at 30-31.) Petitioner argues that he was entitled to be present at the above-described five juror conferences because each involved a question as to the juror's ability to deliberate fairly and as to the juror's impartiality. Petitioner is mistaken.

Petitioner's claim is legally foreclosed by the United State Supreme Court's decision in Gagnon. In that case, a juror expressed concern because he had noticed Gagnon sketching portraits of the jury, conduct which his attorney admitted had occurred. Gagnon's attorney asked the trial judge to question the juror, to determine whether the sketching had prejudiced the juror against Gagnon. The trial judge, along with Gagnon's counsel, met with the juror, and inquired as to the juror's concerns and whether he could continue as an impartial juror. The trial judge explained that Gagnon meant no harm, that the sketching had been confiscated, and that the sketching would cease. 470 U.S. at 523, 105 S. Ct. at 1483.

The Supreme Court rejected Gagnon's claim that his due process right was violated because he was not present at this conference. The Court concluded that the presence of neither the defendants nor their counsel was required to ensure fundamental fairness or a reasonably substantial opportunity to defend. Notwithstanding that the conference related to a concern of juror bias, the Court concluded that it "was not the sort of event which every defendant had a right personally to attend under the Fifth Amendment," reasoning that the defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending." 470 U.S. at 527, 105 S. Ct. at 1484-1485.

In Olano, 62 F.3d at 1190-1191, the Ninth Circuit similarly rejected a defendant's contention that a judge's ex parte conference with a juror constituted "presence" error. The conference occurred following the juror's advice that her daughter had accepted employment with an entity of which one defendant formerly was Chairman of the Board. Noting that the conference in question, as in Gagnon involved a question as to the juror's impartiality, the Ninth Circuit concluded that Gagnon was dispositive of the issue and held that the defendant's Fifth and Sixth Amendment rights had not been violated.

Gagnon is equally dispositive here. Petitioner has asserted that the "very purpose" of the five juror conferences was to "ascertain the impartiality" of the jurors, "prompted by some information raising a possibility that the juror could no longer fairly judge the case based solely on the evidence." (Amended Petition at 31, 37.) Accepting Petitioner's characterization for the moment, that "very purpose," of course, renders these conferences "indistinguishable from the meeting in Gagnon," as well as that in Olano. Olano, 62 F.3d at 1191. As a result, the California Court of Appeal did not unreasonably apply clearly established Federal law, as explicated by the United States Supreme Court, when it declined to find that Petitioner's absence from these five conference did not violate his due process rights. Indeed, that court committed no error at all, and arguably would have erred had it found otherwise, in light of the controlling precedent of Gagnon.

Even absent the controlling Gagnon decision, however, Petitioner's

second claim must be rejected. With respect to the third through fifth juror conferences in issue, Petitioner was represented by his counsel. There is nothing in this record which suggests that Petitioner's interests were not adequately protected by his counsel's presence. Indeed, Petitioner has not alleged that his counsel provided ineffective assistance at any of these conferences. Hence, there is no basis for concluding that a "fair and just hearing [was] thwarted by his absence," as Gagnon requires. 4760 U.S. at 526, 105 S. Ct. at 1484. See also McCoy, 8 F.3d at 497 (due process not violated by defendant's absence from various conference when their counsel's presence adequately protected their interests).

Petitioner, however, with the benefit of hindsight, argues that he was deprived of consulting with his counsel and participating in strategic decisions regarding the subject matter of the five conferences. Petitioner identifies two things he allegedly would have done had he been present: he would have asked that juror Schweda be excused and he would have asked that the trial court instruct all jurors to hold onto their conscientiously- held beliefs and opinions and not surrender to majority pressure. (Amended Petition at 36-36; Petitioner's Declaration appended to Amended Petition at 3-4.) Again, however, Petitioner has not alleged that his counsel was ineffective for failing to do such things. Moreover, the Court concludes that any such actions, even if they had been taken, would have had no effect on Petitioner's trial.

Contrary to Petitioner's contention that juror Schweda certainly would have been excused had he requested such (Amended Petition at 36 n.15), the Court concludes, having carefully reviewed the transcripts of the two conferences with her, that it is highly unlikely that any such request would have been granted. Additionally, the instruction which petitioner alleges he would have requested already had been given to all jurors, through their instruction with CALJIC 17.40, as discussed above. The Court simply is not persuaded by Petitioner's after-the-fact, selfserving claims of things he would have done had he been present at these conferences. That Petitioner may have been an unusually participatory client during his trial, as he and his trial counsel contend (see Declaration of Jeffrey Brodey appended to Amended Petition at 1;

Petitioner's Declaration at 3), does not change the scope of the constitutional rights afforded him.

Petitioner argues additionally that he was unconstitutionally deprived of the psychological influence his presence would have had at each of these five conferences (Amended Petition at 37.) Petitioner relies on the Tenth Circuit's ruling in Larson v. Tansy, 911 F.2d 392, 394-396 (10th Cir. 1990) and the D.C. Circuit's decision in United States v. Wade, 441 F.2d 1046, 1050 (D.C. Cir. 1971) (Id. at 30, 33.) Neither decision is controlling or even persuasive here. In both decisions, the defendant was absent from the reading of jury instructions and the rendering of the verdict. In Larson, he also was absent from closing arguments. These are "crucial stages" of a trial when a defendant's presence may be thought to exert a psychological impact which forces jurors to assume the burden of their decision and affirm it in the presence of the defendant. Larson, 911 F.2d at 395. In addition, there was a reasonable possibility that the jury in both cases may have adversely speculated about the defendant's absence in the courtroom at these crucial stages of trial. Id. Significantly, the Court in Larson held that the defendant had no due process right to be present at the jury instruction conference. Id. Here, the five conferences were held with single jurors outside of the courtroom, and did not involve crucial trial stages. There is no basis whatsoever for concluding that the individual jurors -- who each met with the judge to discuss personal matters -- would have speculated adversely about defendant's absence from these brief meetings.

In any event, Petitioner's "psychological function" argument is refuted by Gagnon. There, in a conference directly pertaining to a question of a juror's ability to be fair and impartial -- the sane issue which Petitioner repeatedly asserts was involved here -- the Supreme Court held that the defendants had no right at all to be present, for they could have done nothing had they been at the conference, nor would they have gained anything by attending." 470 U.S. at 527, 105 S. Ct. at 1484-1485. Under the AEDPA, Gagnon controls here, not pre-AEDPA intermediate appellate decisions from two other Circuits.

For the reasons set forth above, Petitioner has not established any

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constitutional right to have been present at the five conferences between the trial court and individual jurors. As he had no such right under either Sixth or Fourteenth Amendments, his absence cannot support any finding of constitutional error.

Even if, arguendo, the error claimed by Petitioner could be found to have implicated his constitutional rights, this type of error is subject to the harmless error review standard. Rushen, 464 U.S. at 120, 104 S. Ct. at 426. The question then is whether, in light of the record as a whole, the jury conferences held in Petitioner' s absence "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S. Ct. 1710, 1722 (1993). Although the decision of whether a constitutional error was harmless ultimately is one of federal law, the state courts' decisions regarding the substance of an ex parte communication and its effect on the jury are considered findings of historical fact which are entitled to the AEDPA's deference and presumption of correctness. Rushen, 464 U.S. at 120, 104 S. Ct. at 426; see also 28 U.S.C. S 2254(e)(1).

The California Court of Appeal found that these juror conferences had no "reasonable, substantial relationship to any specific substantive legal issue or to [Petitioner's] ability to present a defense." (Return, Ex. B at 86.) Based on this finding, that Court held that Petitioner had no federal constitutional right to be present at these conferences. (Id. at 84-87.) The Court of Appeal further concluded that any purported error was harmless because Petitioner's contention that his presence would have served a psychological function was speculative and assumed certain inadequacies of defense counsel and jurors, of which there was no evidence in the record. (Id. at 86-87.) The Court's own review of the record reveals ample support for the California Court of Appeal's conclusions, for all of the reasons set forth above. Given the nature of the juror conferences involved here, there simply is no reason to believe that Petitioner's absence had a substantial and injurious effect or influence in determining the jury's verdict. Accordingly, even if "error" occurred as a result of his absence (which the Court emphatically believes is not the case), any such "error" was harmless.

The state courts' rulings on Petitioner's "presence" error claims did not involve a decision that was contrary to, or which involved an unreasonable application of, federal law as determined by the Supreme Court. Accordingly, pursuant to Section 2254(d), Petitioner is not entitled to habeas relief on his second claim.

IV. The Trial Court Did Not Violate Petitioner's Sixth and Fourteenth Amendment Rights By Requiring Him To Wear A Leg Brace At Trial

By his third claim, Petitioner contends that his right under the Sixth Amendment to assist his counsel and his right to due process under the Fourteenth Amendment were violated when the trial court required him to wear a leg brace throughout his trial. Although the brace was not visible to the jury, Petitioner contends that it caused him pain and interfered with his ability to participate in his trial. (Amended Petition at 40-52.)[24/]

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24. Petitioner apparently contends that he has a Sixth Amendment right to "meaningfully participate at trial" by providing assistance to his counsel free from any restraint which might affect this right. (Amended Petition at 40, 49.) Petitioner, however, has cited no authority which supports this proposition. The Supreme Court decisions cited by Petitioner (e.g., at Amended Petition at 49-50) do not stand for the proposition that a prisoner has a Sixth Amendment right to be free from restraints (as opposed to a due process right to be free from visible restraints in certain instances). That Petitioner may have been an unusually active participant in assisting his counsel, as he and his counsel allege, does not establish any independent Sixth Amendment - based constitutional right to be free of restraint. In short, the Court finds it dubious that Petitioner's third claim, to the extent that it is based on the Sixth Amendment, is a cognizable constitutional claim at all, much less one which meets the AEDPA's requirement of a violation of clearly established Federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d).

A. The Underlying Proceedings

The California Court of Appeal made factual findings regarding the proceedings which led to Petitioner being placed in a leg brace. (Return, Ex. B at 88-89.) Those findings are entitled to a presumption of correctness, unless rebutted by clear and convincing evidence, 28 U.S.C. 2254(e)(1). Petitioner argues that the trial court's determination rested on inaccurate evidence. (Traverse at 36-37.) In order to adequately address Petitioner's third claim, the Court has independently reviewed the record and sets forth the following pertinent matters from the record.

A day after the jury was sworn, the trial court held a hearing regarding a request by the Los Angeles County Sheriff's Department ("Department") that Petitioner wear a leg brace during trial. (RT at 164.) The trial court first heard argument of counsel concerning whether the Department's request would be considered by the Court pursuant to an in camera proceeding. Significantly, while Petitioner was present, Petitioner's counsel voiced his suspicion that the Department's request might pertain to Petitioner's friendship with James ("Doc") Holliday, a "prospective witness." Petitioner's counsel noted that he was not sure if Holliday would be called as a witness but "we're hoping that he "will be." (RT at 167.)[25/] The trial court also heard the testimony of Sergeant

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25. In this proceeding, Petitioner repeatedly has argued that the trial court's determination regarding the leg brace was based on inaccurate evidence because Holliday was not going to be called as a witness and that he and his counsel already had made that determination before the leg brace issue arose. (See, e.g., Amended Petition at 44, 47 n.21; Petitioner's appended declaration at 2; Traverse at 37; Objections at 14.) In light of his counsel's express representation otherwise at the time the leg brace issue arose, made in Petitioner's presence, Petitioner's argument not only is erroneous, based on the record, but also is misleading. Petitioner's related contention that, had he and his counsel known what about the nature of the Department's concerns, they would have advised the trial court that Holliday would not be a witness, is equally disingenuous. Clearly, Petitioner's counsel had a suspicion as to the impetus for the Department's request yet, in response, expressly

Bruce Fogherty, of the Department, about the nature of the leg brace proposed. (RT at 164-171.) The trial court decided to hold an in camera hearing, due to possible security concerns, to hear the Department's concerns. (Id. at 166, 171.)

At the in camera hearing, Sergeant Fogherty described the reasons for the Department's request. According to Fogherty, Petitioner had an established relationship with Holliday, one of Petitioner's witnesses and a long time leader of a prison gang. (RT at 171A.) Holliday was serving a life sentence without parole and was "a very high security risk" and "high escape risk." (Id.) The Department had received information from its Special Investigations Bureau that "somebody connected with Holliday has said that when he gets to L.A., that stuff is going to happen. He's got nothing to lose. He wants out. (Id.) Sheriff McCarty stated that Holliday's wife had communicated with Petitioner, and that their communication was: "I'll see [Petitioner] in Los Angeles, and that's when it's going to happen." (Id. at 172A.) Fogherty asserted that this communication meant that "escape from court would be most likely." (Id. at 173A.) Deputy McCarthy stated that they did not want defense counsel or defendants to become aware of the Department's efforts to establish the source of this information "because if in fact they are planning something, we want to be more prepared . . . .(Id. at 172A.) He also stated that "an outside source might come in." (Id. at 173A.) The trial judge asked if there had been any past conduct by Petitioner. Fogherty responded that the Department had a "special handling card" on Petitioner, and that Petitioner was the "leader of several Blood gang sets" and had caused some major gangrelated disturbances in jail. (Id. at 174A-175.) The trial court and the Department officers discussed the nature of the proposed leg brace, including the fact that it would not be visible or otherwise apparent to the jury and that Petitioner could move

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confirmed to the trial court Petitioner's desire to call Holliday as a witness. Petitioner was present at the time of that representation to the Court. (RT at 167.) In short, Petitioner's attempt to create the specter of an inappropriate trial court fact determination by way of his own after-the-fact assertions of the purported state of the "facts" is belied by the record itself.

his leg. (Id. at 175-176A.)

The hearing on the leg brace issue then continued in Petitioner's presence. (RT 171.) Petitioner denied acting disruptively in custody, although he admitted to being "young and unruly" in jail ten years earlier. (RT at 174-178.) Petitioner testified that he was not present when a recent jail disturbance took place, but admitted having knowledge that the incident was going to happen, and that he had attempted to stop it but was sent back to his cell and subsequently was unfairly held to have caused or to be responsible for the incident. (Id. at 175-176.) The trial court asked Petitioner how the proposed leg brace would affect him during trial. Petitioner testified that he had experience with wearing leg restraints in court, that they were "extremely uncomfortable," and that they "definitely inhibit one's ability to function, to communicate, you know, to concentrate." (Id. at 178.) The trial court heard testimony from Fogherty that Petitioner was classified as "K-10," which meant that he was kept away from other prisoners and that, if he was going to be exposed to other prisoners, he had to be escorted by a deputy and be restrained and in handcuffs. (Id. at 180.)

B. The Framework For Review

Generally, a criminal defendant has a constitutional right to appear before a jury free of visible shackles. However, a trial judge's decision to shackle a defendant is not per se unconstitutional. 397 U.S. 337, 343-44, 90 S. Ct. 1057, 1060-61 (1970); Rhoden II, 172 F.3d 633; Spain v. Rushen, 883 F.2d 712, 716 (9th Cir. 1989). "Shackling is not per se unconstitutionally prejudicial." Rhoden I, 10 F.3d at 1459.

Shackling "is permitted when justified by an essential interest specific to each trial." Rhoden II, 172 F.3d at 636 (citing Holbrook v. Flynn, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 1345 (1986)). The trial court has discretion to use shackles or other security measures when circumstances dictate." U.S. v. Baker, 10 F.3d 1374, 1401 (9th Cir. 1994). A serious threat of escape or danger to those in and around the courtroom, or where disruption in the courtroom is likely in the absence of shackles, are circumstances that warrant the shackling of a defendant.

Allen, 397 U.S. at 343, 90 S. Ct. at 1060; see also Wilson v. McCarthy, 770 F.2d 1482, 1484-85 (9th Cir. 1985).

The Ninth Circuit has opined that, for a state trial court's abuse of discretion in ordering shackling to be "of constitutional magnitude" and thereby cognizable on federal habeas review, the state court must have ordered shackling without complying with the criteria established by the Ninth Circuit, and the shackling must have been of such a character that the defendant was deprived of due process. Castillo v. Stainer, 983 F.2d 145, 147 (9th Cir. 1992), amended on denial of rehearing by 997 F.2d 669 (9th Cir. 1993). The Ninth Circuit has held that a trial judge must follow a two step process in determining whether to restrain a defendant. A trial court's failure to follow this two step process constitutes an abuse of discretion and gives rise to a cognizable due process claim. Rhoden II, 172 F.3d at 636; Collins, 109 F.3d at 1418. First, compelling circumstances must persuade the court that some measure is needed to maintain courtroom security. Collins, 109 F.3d at 1418; Baker, 10 F.3d at 1401. Second, the trial judge must consider "less restrictive alternatives to shackling" before ordering the defendant to be restrained. Rhoden II, 172 F.3d at 636; Collins, 109 F.3d at 1418.

C. The State Court's Conclusion That Petitioner's Constitutional Rights Were Not Violated Was Not Error

After discussing the record regarding the evidence presented to the trial judge during the hearing regarding the leg brace, the California Court of Appeal concluded:

> The record at the hearing thus established Packer's potential for nonconforming behavior, despite the hearsay nature of and unknown source of some of the information. The court thus acted within its discretion in minimizing the likelihood of courtroom disruption. The court need not wait for an escape or a violent tragedy to occur before ordering an appropriate physical restraint. The court's order was particularly appropriate in view of its finding that the "leg brace will not be visible to the jury; will not impede communications with [Packer's] lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant; and [the defendant] will be seated before the jury enters and remain seated until the jury leaves." Although the trial Packer complained about the emotional distraction and physical discomfort of the leg brace, it was a reasonable physical restraint warranted by the circumstances revealed at the hearing and not necessarily visible by the

(Return, Ex. B at 89.)

1. It is Unclear That Plaintiff's Leg Brace Claim Is Cognizable Under the AEDPA.

As an initial matter, the Court expresses doubt as to whether petitioner's third claim is cognizable under the AEDPA's standard of review, which provides for relief only if the state court's decision is an unreasonable application of clearly established law as determined by the United States Supreme Court. As Petitioner concedes, the Supreme Court has never directly held that use of leg brace is unconstitutional. (Traverse at 33.) The three pertinent decisions cited by Petitioner (id.) are Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340 (1986), Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691 (1976), and Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057 (1970). Holbrook addressed the constitutionality of deploying security personnel in the courtroom during trial; Estelle addressed the constitutionality of forcing a defendant to wear prison clothing during trial; and Illinois v. Allen addressed the constitutional means for handling a disruptive defendant (binding and gagging him, citing him for contempt, and removing him from the courtroom). The Court, in Illinois v. Allen, addressed the concerns which arise from binding and gagging a defendant, including the effect on the jury of the sight of shackles and gags, the possible affront to the dignity of the proceeding, and the affect of "total physical restraint" on the defendant's ability to communicate with his counsel. 397 U.S. at 344, 90 S. Ct. at 1061. The Court, nonetheless, concluded that binding and gagging a defendant might be fair and reasonable in some circumstances. Id.

The principal concern in these three decisions was the possibly prejudicial and unconstitutional effect of the jury viewing these matters, i.e., a defendant's gag and shackles, a defendant's jail clothing, or security personnel. In short, the Court was concerned in each case about visible circumstances affecting the jury's perception of a defendant. See Rhoden II, 172 F 3d at 635 (discussing all three decisions). This concern is absent here, given that Petitioner has conceded that he cannot prove that the jury saw his leg brace. (see Knox. Decl. at 3; Objections at 16.) Indeed, the Ninth Circuit decisions to date which have addressed the constitutionality of shackling have held that no constitutional violation occurs when the shackling is not visible to the jury. See, e.g., Rhoden II, 172 F.3d at 636; Castillo, 983 F.2d. at 149. Moreover, the concern noted in Allen as to the effect on a defendant's ability to communicate with counsel was motivated by the effect of "total physical restraint," i.e., due to gagging and binding. Petitioner did not experience any such total physical restraint here: he was not gagged and wore a hidden leg brace which allowed him to walk and other limited movement, including standing.[26/]

As discussed above in connection with Petitioner's first claim, the Supreme Court has made clear that law created by a federal appellate court is not "clearly established Federal law" within the meaning of the AEDPA but that the AEDPA's "unreasonable application" prong may encompass an unreasonable failure by the state court to apply a legal principle to a "new context." Williams, 120 S. Ct. at 1521. The Court is unconvinced that the state courts' failure to extend the Supreme Court's decisions in Allen, Holbrook, and Estelle to encompass a leg

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26. The Department demonstrated the functioning of the leg brace to the trial court, noting that it is worn on one leg and allows the wearer to stand up or sit down" but apparently locks in a straight position if the wearer stood up. (RT at 169-170.) In his declaration submitted in this proceeding, Petitioner states that he could not rise when the trial judge entered and that the "eyes of many of the jurors fell on me at that time, increasing my humiliation and engendering further concern about the jury's reaction to me." (Petitioner's Declaration appended to Amended Petition at 2-3.)

brace which is not visible to the jury can be said to constitute an objectively unreasonable failure to apply clearly established United States Supreme Court holdings --- the standard required for AEDPA review. However, given the various Ninth Circuit decisions addressing shackling which involve restraints that are less than the Illinois v. Allen "total physical restraint," the Court will consider Petitioner's third claim under the AEDPA's deferential standard of review, i.e., whether the California Court of Appeal's decision rejecting this claim constituted an unreasonable application of clearly established Federal law under section 2254 (d) (1).[27/]

2. Petitioner's Leg Brace Did Not Violate His Constitutional Right

As discussed in more detail above, the trial judge conducted hearings to assess the potential security risks posed, and allowed Petitioner to testify regarding the allegations of recent jail misconduct.[28/] The trial court also allowed Petitioner to testify as to what effect the leg brace would have upon him at trial, Department officers provided information about a possible escape attempt which would occur during

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27. In his Amended Petition, Petitioner appeared to argue that he is entitled to relief under Section 2254(d)(1). In his Traverse, he raised an additional argument that he was entitled to relief under Section 2254(d) (2) because the trial court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (Traverse at 36.) Here, of course, the pertinent state decision is that of the California Court of Appeal. In any event, the Court has independently reviewed the record in connection with this claim and will determine whether habeas relief is warranted under either subparts (d)(1) or (d)(2).

28. The Court notes, however, that Petitioner did not have an opportunity to testify about the possible escape attempt regarding Doc Holliday and the alleged communication with his wife. However, given the obvious security concerns posed by this information, it was not unreasonable for the trial court to have considered this information on an in camera basis, without disclosing it to Petitioner or his counsel.

Petitioner's trial.[29/] Although the information, before the trial court may not have presented the most compelling possible case for shackling, it certainly formed a reasonable basis for concluding that a security risk existed which warranted imposing restraints for the security of all involved in Petitioner's trial, particularly given the non-visible and minimally-restrictive type of leg brace contemplated. It is important to note that neither the Supreme Court nor the Ninth Circuit has held that a trial court must conduct a hearing, with sworn testimony and the presentation of other evidence, and must make specific findings before ordering that a defendant be shackled. Indeed, the Ninth Circuit explicitly has refused to require such procedure before shackling may be imposed constitutionally. Morgan v. Bunnell, 24 F.3d at 52 (citing Jones v. Meyer, 899 F.2d 883, 886 (9th Cir. 1990)).

As noted above, Petitioner argues that the fact that Holliday was not called as a witness and that no escape attempt occurred establishes that the trial court relied on inaccurate evidence. Petitioner's assertions as to after-the-fact events plainly are irrelevant to the pertinent question, which is whether the trial court abused his discretion in ordering shackling based on the information before him at that time. As also noted above, at that time, Petitioner's counsel had expressly represented to the trial court his intent to call Holliday as a witness if possible.[30/] (RT

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29. "Shackling is proper where there is such a threat of escape." Morgan v. Bunnel, 24 F.3d 49, 51 (9th Cir. 1994).

30. Petitioner has argued that the record lacks any evidence before the trial judge as to a possible escape attempt by Holliday. (Objections at 14.) Having carefully read the transcript, the Court concludes that the only fair and reasonable reading of the Department's statements to the trial judge is that the Department was concerned about an escape attempt by Holliday in connection with his appearance as a witness at Petitioner's trial. Petitioner attempt to characterize the Department's statements as indicating some sort of unspecified, innocuous event is disingenuous. Petitioner's statement that this information "had nothing to do with petitioner" because he was not going to try to escape (id.) is equally disingenuous. The security risk

at 167.)

Based on the information before the trial court, it cannot be said that it was error to have found that "compelling circumstances" existed which reasonably indicated that some restraint was needed to maintain courtroom security.[31/]

> [A] trial judge is charged with the grave responsibility of guarding the safety of the courtroom personnel, parties, counsel, jury and audience and, where there is a material risk that the defendant might attempt an escape, the public at large. The judge has wide discretion to decide whether a defendant who has a propensity for violence poses a security risk and warrants increased security measures.

Morgan, 24 F. 3d at 51. In the present case, there was sufficient evidence before the trial judge which reasonably would have raised these same types of security concerns as to Petitioner and his trial. Accordingly, there was no abuse of discretion by the trial court under the first step of the Ninth Circuit's two-step process.

The next step of the analysis involves the question of whether the trial court considered less restrictive alternatives to shackling. The trial

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involved an escape attempt by a defense witness which might occur at Petitioner's trial. The trial judge had received information that petitioner had been apprised of that possible escape attempt. In light of that information, the trial judge reasonably could have concluded that there was a risk to the safety of all present at the trial and that, given Petitioner's asserted knowledge of the escape plan, he posed a security risk. Morgan, 24 F.3d at 51.

31. Petitioner asserts that he is not challenging the process by which the trial court ordered that he wear a leg brace, but complains that the ruling was based on inaccurate and speculative triple hearsay. (Amended Petition at 43 n.18.) As Morgan makes clear, however, this argument is no basis for habeas relief on a shackling claim.

court noted defense counsel's concern about visible restraints and other more restrictive restraints, received a demonstration of the proposed leg brace, and opted for use of a leg brace that allowed for some movement and which would be worn underneath the pant on one leg, undetectable to a jury. (RT at 166, 170, 176A, and 199-200 The record clearly shows that the trial judge was concerned about whether the brace would be visible or otherwise apparent to the jury, whether Petitioner's movement would be restricted, and whether Petitioner would be uncomfortable.[32] (Id. at 169, 176A.) It also is clear that when the trial court returned after having taken the leg brace issue under submission, he had considered the harms attendant to shackling, which were identified in Illinois v. Allen and in various intermediate appellate decisions. Thus, the court confirmed that "the leg brace will not be visible to the jury; will not impede communications with [Petitioner's] lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant and . . . he will be seated before the jury enters and remain seated until the jury leaves." (Id. at 199-200.) The trial judge further ruled that if the "defendant chooses to take the stand, he'll be on the stand before the jury enters and remain on the stand until after the jury leaves." (Id. at 200.)

It is unclear, however, whether the trial judge considered any other alternatives to the leg brace. If he did so, he did not expressly indicate his consideration of such on the record. Of course, he was not required to make specific findings in this respect on the record in order for Petitioner's leg brace to be constitutional Morgan, 24 F.3d at 52; see also Duckett v. Godinez, 67 F.3d 734, 749 n.7 (9th Cir. 1995), cert. denied, 517 U.S. 1658, 116 S. Ct 1549 (1996). The less restrictive alternatives step ensures that the trial judge assesses the possible harms to the defendant from shackling, including reversal of the presumption of innocence, impairment of defendant's mental abilities, impeding communication between defendant and his counsel, detracting from trial

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32. The leg brace used was attached to one leg only with a velcro strap, and was worn under the pant leg so as to be inconspicuous. It allowed the wearer to stand up and sit down and for some leg movement, but prevented running and fleeing. (RT at 169-170.)

decorum, and pain, and weighs these factors against other possible alternatives. Morgan, 24 F.3d at 51; Castillo, 983 F.2d at 147. The trial judge expressly did consider these factors, as noted above, before he rendered his ruling. He also read the Ninth Circuit's decision in Spain v. Rushen, supra, before rendering his ruling (RT at 172, 199) , which discussed the less restrictive alternatives prong. 883 F.2d at 721. Accordingly, although he did not state on the record what, if any, other alternatives he considered, it appears that the trial court complied with the second step of the process identified by the Ninth Circuit.[33]

Even if, arguendo, it could be concluded that the trial court abused its discretion in ordering Petitioner to wear the leg brace, the error, if any, is deemed harmless. "A claim of unconstitutional shackling is subject to harmless error analysis." Rhoden I, 10 F.3d at 1459; Castillo, 997 F.2d at 669. The Ninth Circuit repeatedly has held that, even when shackling has been improper, the error is harmless -- and no habeas relief is warranted -- when the jury did not see or otherwise become aware of the shackling. See, e.g., Rhoden II, 172 F.3d at 636; Duckett v. Godinez, 109 F.3d 533, 535 (9th Cir.), cert. denied, 522 U.S. 848, 118 S. Ct. 135 (1997); Castillo, 983 F.2d at 149.

As discussed above, an investigator, hired by Petitioner, spoke with jurors and found that none of the jurors interviewed had, in fact, seen the leg brace at Petitioner's trial. Petitioner withdrew his Request for an Evidentiary Hearing upon receipt of the investigator's findings. Petitioner's counsel declared that she no longer "believe[d] [she would]

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33. In Wilson, 770 F.2d at 1486, the Ninth Circuit noted "some concern over the apparent failure of the trial court to consider less drastic alternatives to shackling." The Court, however, nonetheless found no abuse of discretion because the habeas petitioner had failed to prove that less drastic alternatives were available and that the trial judge had abused his discretion by not implementing them, and denied habeas relief. Id. Here, Petitioner has suggested possible alternatives (Objections at 16) but, as in Wilson, has not established that they were available or that the trial judge abused his discretion by not ordering them instead of the leg brace under consideration.

be able to present evidence at a hearing supporting a position that jurors [saw] the security restraint." (Knox Decl. at 2-3.) More recently, Petitioner has stated that he "acknowledges that he is unable to prove that any jury was aware of the restraint . . . ." (Objections at 16.) In sum, Petitioner concedes that his "leg brace was not visible to the jury. As a result, even if it could be said that shackling Petitioner was "error," any such error was not prejudicial and was harmless.

Petitioner, however, argues that he nonetheless was unconstitutionally prejudiced by the leg brace. As noted above, Petitioner alleges that he was unable to stand when the trial judge entered. In Castillo, the petitioner wore a waist chain that could not be seen by the jury. In his habeas proceeding, the Ninth Circuit rejected his argument that the jury could have "inferred the presence of restraints" from the fact that the jury saw petitioner as a seated witness and saw his co-defendant walk to and from the witness stand. The Court denied habeas relief on the petitioner's shackling claim even though it concluded that the trial court had committed constitutional error in permitting shackling, reasoning that such error was harmless:

> Unseen, the restraint could not have affected the presumption of innocence or detracted from the decorum of the trial. [cit. om.] . . . The trial court's error was unimportant to everything the jury considered. As far as the jury was concerned, the chain was invisible and therefore the court's error was harmless beyond a reasonable doubt.

983 F.2d at 149. For the same reasons, Petitioner's allegation that he suffered "humiliation" and concern about the jury's reaction when he did not stand as the trial judge entered cannot serve as a basis for habeas relief.

Petitioner also asserts that his pain and discomfort incurred as a result of wearing the leg brace caused him humiliation and frustration. He asserts that, as a result, his attention from the trial was diverted and that he could not assist and consult with counsel as he planned. (Petitioner's Declaration appended to Amended Petition at 2-3.)

Petitioner's counsel also has submitted a declaration in which he states his observation that Petitioner was "extremely affected" by the leg brace, and that Petitioner consulted and discussed matters less with counsel as a result of the brace, as well as complained of pain. Petitioner argues that these matters establish that ordering him to wear the leg brace was an error which was not harmless.

Under prevailing law, the Court cannot agree. Under the current state of the law in this Circuit, as discussed above, any asserted shackling error is not harmless only when the shackling was visible. See Rich v. Calderon, 187 F.3d 1064, 1069 (9th Cir. 1999), cert. denied, ___ U.S. ___ 120 S. Ct. 827 (2000) ("Our case law is clear: where care is taken to ensure that a defendant's shackling is not visible to the jury in the courtroom, no error results.") As Petitioner's shackling admittedly was not seen by the jury, any "error" (and, again, the Court notes that its conclusion is that no error occurred here) is "harmless. " Significantly, Petitioner does not allege that he could not communicate with his attorney, only that his communication was affected. He has not alleged any way in which this affect on communications prejudiced his trial by influencing the jury's verdict. Given that there was no actual prevention of Petitioner's communications with counsel, there was no deprivation of the assistance of counsel. King v. Rowland, 977 F.2d 1354, 1358 (9th Cir. 1992.) With respect to Petitioner's allegations of pain, humiliation, frustration, and attention diversion, while these factors may be relevant to the due process question,[34/] absent a risible restraint, they alone do not allow, under current Supreme Court and Ninth Circuit decisions, a finding of constitutional error under the harmless error standard. Again, the test is whether the error "'had substantial and injurious effect or

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34. The Court notes that, in Rhoden II, the Ninth Circuit concluded that there was a strong likelihood of prejudice given the substantial evidence indicating that the jurors remembered seeing shackles many years after trial and did see the shackles, and the evidence that the Shackles caused the defendant physical and emotional pain. 172 F.3d at 637. Accordingly, pain was a factor in finding prejudice in that case but, again, the decision turned on the visibility of the shackles. Id. at 636-638.

influence on the jury's verdict.'" Duckett, 109 F.3d at 595 (quoting Brecht, supra) if the shackles were not visible to the jury, the requisite effect or influence on the jury's verdict cannot be found.

In so concluding, the Court by no means makes light of any emotional or physical pain which Petitioner may have experienced as a result of the leg brace he wore. However, the Court is bound by both the law in this Circuit and the AEDPA standard of review. As "clearly established federal law" as explicated by the Supreme Court presently stands, a claim alleging non-visible shackling, coupled with pain and interference with participation at trial, does not transform asserted "error" into that which is not harmless and does not warrant federal habeas relief.

The California Court of Appeal's conclusion -- that the imposition of a leg brace did not violate the Constitution -- was not contrary to, nor did it involve an unreasonable application of, federal law as determined by the Supreme Court. The decision also did not involve an unreasonable determination of the facts in light of the evidence presented. Therefore, Petitioner's assertion of unconstitutional shackling fails under Section 2254(d), and no habeas relief can be granted as to his third claim.

V. Petitioner's Right To Be Tried by the Jury First Empaneled Was Not Violated

By his fourth and last claim, Petitioner contends that his right to be tried by the jury first empaneled, under the Fifth, Sixth and Fourteenth Amendments, was violated when the trial judge dismissed a juror ("Ferguson") and replaced that juror with an alternate. (Amended Petition at 53.) Petitioner argues that good cause did not exist to excuse Ferguson because Ferguson herself stated that she could remain impartial. (Id. at 58.) A criminal defendant has the right to have the jury first empaneled attempt to reach a verdict. Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834 (1949); United States v. Bates, 917 F.2d 388, 392 (9th Cir. 1990). Under California law, a trial court, upon good cause, may discharge any juror found to be unable to perform the duties of a juror at any time during trial. Cal. Penal Code § 1089. This

procedure, when, as here, followed by the trial court, preserves the "essential feature" of the jury required by the Sixth and Fourteenth Amendments. See Miller v. Stagner, 757 F.2d 988, 995 (9th Cir) , as amended, 768 F.2d 1090 (9th Cir. 1985) This Court, therefore, need only decide whether Section 1089's application under the circumstances of this case violated Petitioner's rights. See, e.g., Perez v. Marshall, 119 F.3d 1422, 1426 (9th Cir. 1997.) Specifically, did good cause exist in this case for the trial court to excuse Ferguson?

The California Court of Appeal examined the record, as described below, and concluded that there was good cause to dismiss Ferguson and that the trial court neither abused its discretion nor violated any of Petitioner's constitutional rights in doing so. (Return, Ex. B at 74-79.)

Near the end of the presentation of evidence, the prosecutor announced that he had information that one of Ferguson's coworkers had made an improper comment to her regarding the case. The prosecutor learned of the conversation because Ferguson worked for the District Attorney's office. (RT at 2563-2564.) The trial judge called Ferguson in to discuss the matter. Ferguson related that her supervisor had told her to "just tell them they're guilty." (Id. at 2565-2566.) The judge asked Ferguson to wait outside, and then advised the attorneys that his inclination was to relieve her from further jury service. Defense counsel expressed a desire to question Ferguson regarding any effect this comment had on her ability to be fair. (Id. at 2566-2567.) Ferguson came back in and told the court had the exchange with her supervisor "doesn't [a]ffect me at all . . . but acknowledged that "knowing everybody" in the courthouse made it "difficult to be on this case." (RT at 2568.) When the trial judge asked Ferguson what she meant by "knowing everybody," Ferguson replied that "the attorneys and the cops just say things to me." (Id.) When asked who had said things, Ferguson first said "no one," but then admitted that "they" would ask her what was going on, asserting that she would not comment in response. (Id. at 2568-2569.)

After excusing Ferguson, the trial judge discussed the situation with counsel. The prosecutor expressed concern about the situation, and

defense counsel asked the Court not to excuse Ferguson. (RT at 2570.) The trial court was "bothered" by Ferguson's comments that others had talked to her, expressing concern that Ferguson was not fully disclosing the situation with respect to comments made to her, given that Ferguson first had answered "no one" when asked if anyone had talked to her. The trial judge excused Ferguson and ordered that she be replaced with an alternate juror. (Id. at 2570.)

The Court concludes that substantial evidence supports the trial court's conclusion, and the Court of Appeal's finding, that there was good cause for dismissing Ferguson. The trial court interviewed Ferguson before determining that she was unfit to continue and discovered not only that Ferguson's supervisor had improperly told her that the defendant was guilty, but also that others in the courthouse (e.g., police, attorneys, etc.) had spoken to her about the case. Thus, the trial court reasonably could have concluded that Ferguson was being subjected to pressure from her employer, attorneys, and police officers, which supported the trial court's concern as to her ability to remain impartial. Although Ferguson claimed she was capable of being fair and impartial, in the same breath she admitted, "It's difficult for me to be on this case knowing everybody down here . . . .[35/] (RT at 2568.) Equally, if not more, troubling is the appearance that Ferguson was not completely forthcoming with information, given her initial denial that

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35. Petitioner relies on decisions which have found that, in certain circumstances, jurors hearing otherwise potentially biasing information are not required to be dismissed when the juror has assured the trial judge that such information did not affect their ability to be impartial. (Amended Pet. at 56, citing Rushen v. Spain, 464 U.S. 114, 104 S. Ct. 453 (1983), Bayramoglu v. Estelle, 806 F.2d 880 (9th Cir. 1986), and United States v. Daly, 716 F.2d 1499 (9th Cir. 1983).) However, these cases do not preclude a finding that a juror may not be able to remain impartial, despite assurances to the trial court. In this case, there was ample evidence to conclude that Ferguson's assurances of impartiality were unrealistic in light of the comments made to her, and pressure imposed upon her, by her employer, attorneys and police officers.

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anyone had spoken to her and subsequent admission of the situation only when questioned further.

This Court agrees with the California Court of Appeal's conclusion that Ferguson's assertion that she could remain impartial was unrealistic in light of the pressure being placed upon her and her concession that it was difficult for her to serve on the case. (Return, Ex. B at 74-79.) The state court's decision on this issue can be disturbed only if it was contrary to or involved an unreasonable application of Supreme Court precedent, or was based on an unreasonable determination of the facts as presented in the state court proceeding. See 28 U.S.C. 2254(d). Neither circumstance exists here. The determination that good cause existed for the removal of Ferguson is well-supported by the record and was not unreasonable. See, e.g., Perez v. Marshall, 119 F.3d at 1428 (affirming denial of writ when state court's good cause determination was supported by the record) . Accordingly, under Section 2254(d), Petitioner is not entitled to habeas relief on his fourth claim,

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) DENYING Petitioner's amended petition for writ of habeas corpus; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: September 29, 2000.

[Signature]
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate

Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX G

SUPREME COURT
FILED
JUL 12 1995
Robert Wandruff Clerk
DEPUTY

Second Appellate District, Division Two, No. B071156
S046556

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

BOBBY RAY JORDAN Et al., Appellants

Appellants' petition for review DENIED.

LUCAS
Chief Justice

APPENDIX H

COURT OF APPEAL - SECOND DIST.
FILED
APR 13 1995
JOSEPH A. LANE _____ CLERK
DEPUTY CLERK

NOT TO BE PUBLISHED

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO**

THE PEOPLE, Plaintiff and Respondent, v. BOBBY RAY JORDAN, et al., Defendants and Appellants.	B071156 (Super. Ct. No. A958712 c/w No. A957998)

APPEALS from judgments of the Superior Court of Los Angeles County, Beauford Phelphs, Judge. Affirmed.

David R. Evans and Cheryl Lutz, under appointments by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, and Jaime Fuster, and S. Allison Hughes, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Bobby Ray Jordan and William Packer were convicted by a jury of murder, robbery and several related offenses. Specifically, Jordan was found guilty of first degree murder, attempted murder, forcible rape while acting in concert, forcible oral copulation while acting in concert, assault with a deadly weapon, first degree residential robbery, exhibiting or using a firearm or deadly weapon, attempted, willful, deliberate and premeditated murder and attempted second degree robbery. The jury also found true related allegations of the personal use of a firearm. Jordan also pled guilty to an additional count of robbery with the personal use of a firearm and admitted allegations that he was out on bail at the time of the alleged offenses. He was sentenced to prison for a term of 36 years to life with an additional consecutive life sentence.

Packer was found guilty of second degree murder, attempted murder, attempted first degree residential robbery (two counts), assault with a deadly weapon (two counts) and assault with a firearm. The jury also found true related allegations of the personal use of a firearm and the infliction of great bodily injury. Packer was sentenced to a determinate prison term of 23 years and 4 months plus a consecutive indeterminate term of 17 years to life.

On appeal, Jordan contends that (1) his confession was involuntary and improperly admitted, and (2) his term of life imprisonment for first degree murder is cruel and unusual punishment. Packer contends as follows: (1) a juror was excused without good cause, (2) the trial court's comments to the jury after extensive deliberations and verdicts on all but two counts were coercive and denied due process, (3) he was denied the right to be present during six occasions when the court conferred with jurors, (4) there was no manifest need for him to wear a concealed leg brace restraint during trial, (5) the court improperly revoked his cocounsel status, and (6) moving the trial from the Central Judicial District to another part of the county (Van Nuys) violated the constitutional right to a trial by jurors chosen from the vicinage. We find the contentions of both Jordan and Packer without merit and affirm.

FACTS

1. September 2, 1987, Incident (Involving Jordan)

In the early evening of September 2, 1987, Robert Taylor and Jordan entered the Altadena Dairy on Slauson Avenue and approached the cashier, John Street. Taylor and Jordan stood at opposite sides of the counter. One of them said, "This is a hold up. Don't move." Jordan, who was in front of the cashier, ordered Street to "Come out before shoot you in the head." Street pleaded with the gunman not to shoot him. Nonetheless, Taylor shot the cashier, who then reached back for a gun by the cash register. Taylor shot him again. The cashier then randomly shot his gun a couple of times. Jordan was hit by a bullet in the left arm as he fled. The first bullet to hit the cashier required surgery to his intestine and resulted in severe abdominal and back pain; the second bullet wounded both of his legs.

Subsequently, Jordan admitted to investigating detectives that he was walking in his neighborhood with Taylor (Packer's brother) when they decided to rob a dairy on Slauson Avenue. Jordan and Taylor then obtained two .22 caliber revolvers and went to the dairy with their guns out and announced to the cashier that this was a hold up. Jordan claimed that after the cashier got a gun and shot at them, hitting Jordan in the left arm, Taylor fired back at the cashier and then drove to a nearby hospital. Jordan fabricated a story for a police report regarding a drive-by shooting at some other location.

2. September 24, 1987, Incident (Involving Jordan and Packer)

On the evening of September 24, 1987, Phinus Bradley, a drug dealer, and his clients, Ron Billings and Sandra Jones, were in Bradley's Hollywood apartment. Joseph Lauzon telephoned Bradley and told him he would be by later to purchase cocaine. Lauzon, who was joined by Jordan, Packer and Bernard Berryl went to Bradley's apartment with the intent to rob him.

At approximately midnight, Bradley opened the apartment door for Lauzon, who he thought was a customer. Once the door opened, Packer burst into the room, displayed police badge and gun, and announced that

he was a police officer. Jordan and Berry, each of whom were also armed, followed Packer into the apartment. Packer ordered everyone on the floor; Jones, Bradley and Lauzon obeyed. Announcing that he, too, was a police officer, Jordan directed Billings to get on the floor as well. Packer took Jones into the bathroom and shut the door behind them.[1/]

Berry and Jordan both searched the apartment and asked where the drugs and the money were. Jordan searched Billings's pockets and took a swatch watch and some money. When Packer came out of the bathroom, Jordan went into the bathroom with Jones and forcibly raped and orally copulated her.

The intruders also ransacked the apartment and repeatedly demanded to know where the drugs were. One of the men held a gun to Billings's head and dry fired it several times. Packer announced that they would have to kill Bradley, and then hit Bradley in the head with the barrel of his gun.

At that moment, Gregory Jackson, who was delivering drugs to the apartment, and Jamel Byrd knocked at the door. Packer slowly opened the door, reached out and tried to grab Jackson, and then pointed a gun at him as he ran down the hall. Packer than turned to Byrd, demanded drugs and money, and patted him down. Packer took nothing from Byrd, and then hit him in the head. Byrd fled.

Meanwhile, Jackson ran downstairs and told the apartment security guard, Oscar Avila, that there was a robbery in Bradley's third-floor apartment. Avila went to the third floor, ordered all bystanders back into their rooms, and encountered Jordan holding a gun. Avila drew his own weapon and told Jordan to drop his. Jordan lowered his gun slightly. As Jordan got into the elevator in front of him, Avila saw Packer moving to his left with his hands inside his shirt. Avila turned to his left, held his gun arm straight out and told Packer to drop his gun. Packer refused and demanded that Avila drop his gun. Avila decided not to fire his gun, but Packer fired at him. The bullet passed through the side of Avila's face,

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1. Jones testified at trial as to acts of forcible oral copulation, forcible sodomy and forcible rape by Packer. The jury acquitted Packer of all sex-related offenses, and this court is, of course, bound to assess the evidence "in the light most favorable to the judgment below." (People v. Johnson (1980) 26 Cal.3d 557, 578.)

seriously wounding him, and then struck Berry in the heart and killed him.

Several days later, Jordan was arrested near Santa Monica College after he ran through the campus and attempted to flee into the neighboring residential area. After his arrest and advisement and waiver of his Miranda rights, Jordan confessed in tape-recorded interviews to his participation in the September 24, 1987, incident at Bradley's apartment, as well as the September 2, 1987, Altadena Dairy robbery.

On October 26, 1987, Packer was arrested in Florida. When his girlfriend visited him in jail, he admitted that he had gone to rob the apartment in Hollywood and that the robbery had "gone bad."

In his defense at trial, Packer admitted he was a drug dealer, supplied drugs for others to sell, and had suffered four prior felony convictions. After he supplied drugs to a person who then revealed to him that he had been robbed of the drugs by people at the Hollywood apartment,. Packer went to reclaim his contraband. Packer admitted taking his Smith and Wesson .357 caliber Magnum gun to the Hollywood apartment, denied any forcible sexual conduct with Jones, but admitted striking Bradley on the side of head with his gun and attempting to find drugs and money in the apartment. According to Packer, when Packer and Jordan left the apartment and entered the hallway where they found Avila, Packer surmised from the look on Avila's face and the way he was holding gun and aiming it the side of Packer's chest that Avila was getting ready to shoot him. Packer then stepped to his side, raised his pistol and fired a shot at about the same moment that Avila fired his gun. Packer, admittedly angry and determined, shot Avila, who stumbled back and fired another shot, aiming at Jordan.

In rebuttal, the prosecution presented evidence that based on the angle of the entry and exit wounds, Avila was facing away from the barrel of Packer's gun, not looking in the direction of Packer at the time he fired at Avila and that Avila was facing to the side and toward the elevator when he was hit.

DISCUSSION

I. Jordan's Confessions Were Voluntary

In reviewing a defendant's confession, we "examine the entire record and make an independent determination of the ultimate issue of voluntariness." (Davis v. North Carolina (1966) 384 U.S. 737, 741-742; see People v. Benson (1990) 52 Cal.3d 754, 779.) The uncontradicted facts are examined to determine independently whether the trial court's finding of voluntariness was proper, in view of the prosecution's burden "'to show that a confession was voluntarily given without previous inducement, intimidation or threat.'" (People v. Jimenez (1978) 21 Cal.3d 595, 609; see People v. Anderson (1990) 52 Cal.3d 453, 470.)

In the present case, the trial court reviewed the transcript of the tape-recorded interview with Jordan. No other evidence was presented on the voluntariness of the confession. The trial court concluded that statements by the interviewing officers did not constitute threats or promises and that they made no offer of leniency to Jordan. Although substantial evidence in the transcript of the interview supports the trial court's finding, we "independently determine whether the trial court's finding of voluntariness is well founded." (People v. Simpson (1991) 2 Cal.App.4th 228, 232; see In re Eric J. (1979) 25 Cal.3d 522, 527.)

Jordan contends that he confessed to his involvement in the felony murder only when the interviewing officers promised him he would not be booked for murder if he confessed to his knowledge and involvement in the underlying robbery. According to Jordan, the import of the officers' statements was to threaten him with a harsher penalty if he continued to deny his involvement in the robbery leading to the homicide, and that the officers implicitly promised more lenient treatment if Jordan confessed to the robbery. This claim is based on the officers' statements to Jordan, after Miranda warnings and waivers and Jordan's denial of knowledge about Berry's death.

Jordan focuses upon the following portions of the officer's statement: "[O]bviously . . . you're not telling us the truth. We know you were there, what happened up on Cherokee [at the apartment in Hollywood]. We know the whole story. Hey. Listen to me for a second. Okay? I'm trying to save you a lot of problems . . . . There's no reason to

sit here and hide what happened . . . . [Y]ou weren't the one who shot the security guard. Okay?. . .All right. Don't play games. You're gonna to tie yourself up [in] this -- in deeper and deeper if you sit there and deny and lie. If you want to play games, we'll go ahead and put you in jail for murder. All right. . . .Don't bullshit us." Jordan's assertion that such statements threatened him with a harsher penalty if he continued to deny his role and implicitly promised lenient treatment in exchange for a confession is unfounded.

It was undisputed at the hearing on the voluntariness of the confession that the police knew, prior to interviewing Jordan, that (1) Bradley and other witnesses had identified Jordan, (2) property belonging to Jordan was found in the vehicle which had brought Berry to the hospital, and (3) the police "had the knowledge [necessary] and the intent to charge him under a felony-murder theory." Moreover, Jordan was informed, prior to his statements, that he was going to be booked and that he was going to jail.

It is well settled that advice or exhortations by a police officer that a suspect "tell the truth," unaccompanied by threats or promises, do not render a confession involuntary. (People v. Hill (1967) 66 Cal.2d 536, 549; People v. Adams (1983) 143 Cal.App.3d 970, 987.) Nor does an assertion that an accused is better off telling the truth constitute a false promise of leniency. (People v. Maestas (1987) 194 Cal.App.3d 1499, 1507.) Viewing the interview with Jordan as a whole and in the context of the developing dialogue between the accused and the police and in light of the totality of the circumstances surrounding the confession (see People v. Johns (1983) 145 Cal.App.3d 281, 291), it is apparent that the officer's exhortations not to "sit there and hide what happened," not to "play games," and not to continue to "deny and lie" were merely admonitions to tell the truth which do not amount to coercion.

The officer's single remark to Jordan that if he continued "to play games, we'll go ahead and put you in jail for murder" was not an implied threat to punish him with a harsher penalty if he continued to deny his involvement in the robbery or an implicit promise to be more lenient if he confessed. Obviously, if Jordan was not going to admit the activities in which the police already knew he participated, including felony-murder, there would be no need to question him further. As the police candidly told Jordan, they might as well then "go ahead and put [him] in

jail for murder."

The above remark was thus an accurate statement. As the police advised Jordan, they already knew "the whole story." They thus intended to jail Jordan for felony-murder in any event. The record reveals no direct or reasonably inferred promise of any benefit, but only a possible negative consequence. Even improperly taking the one remark about jailing Jordan for murder out of context (see People v. Johns, supra, 145 Cal.App.3d at p. 291), the officer's statement was merely a comment "on the realities of [Jordan's] position." (People v. Andersen (1980) 101 Cal.App.3d 563, 583.)

Moreover, a confession is involuntary only if it has been extracted or obtained improperly (Hutto v. Ross (1976) 429 U.S. 28, 30), and requires "coercive questioning" which overcomes the suspect's volition by means of threats or false promises. (People v. Andersen, supra, 101 Cal.App.3d at p. 575.) Here, it is apparent that the detective's remark was not the proximate cause of Jordan's statement. After the remark, Jordan continued to lie and deny his involvement in the crimes until only later, when confronted with the facts of the case as known by the detectives. Even then, Jordan continued to minimize his involvement and deny knowledge of his companion's intentions in going to Bradley's apartment. Accordingly, it is apparent that the detective's remark was not the proximate cause of the confession. (See People v. Benson, supra, 52 Cal.3d at pp. 778-779, 781.)

Finally, any error in admitting Jordan's confession would be harmless beyond a reasonable doubt. (See People v. Johnson (1993) 6 Cal.4th 1, 32.) Four people, including Packer, positively identified Jordan as a participant in the robbery at Bradley's apartment. Jordan also admitted to the victim's aunt that he was with Berry when Berry was shot and that although he did not intend to shoot Berry, he and his companions "had to take some motherfucker out." Bloodstains at the scene near Berry's body which matched Jordan's blood, as well as Packer's statement to his girlfriend that he and Jordan had been involved in a "robbery gone bad," also contributed to overwhelming incriminating evidence against Jordan. Even absent Jordan's confession, there is thus no reasonable basis upon which to conclude that the jury would have reached a different verdict.

II. Jordan's Sentence of 25 Years to Life for First Degree Murder Was Not Cruel or Unusual Punishment

Relying on People v. Dillon (1983) 34 Cal.3d 441, Jordan contends the trial court violated the prohibition against cruel and unusual punishment by refusing to vacate his 25-years-to-life sentence and to sentence him as a second degree murderer. Jordan urges that the sentence was overly harsh because he was only an aider and abettor, and not the actual shooter (who was only found guilty of and sentenced for second degree murder), he was 19 years old, and he had a limited prior criminal record and a psychological profile indicating he was immature and of impaired intelligence.

However, Jordan, at age 19, was legally an adult, unlike the 17-year-old in Dillon. Moreover, the psychological evaluation submitted by Jordan's counsel merely indicated he was "of low average intelligence," and not that he had a significantly impaired intelligence, as inaccurately represented on appeal. In fact, the psychological report revealed there was no evidence of any "primary intellectual deficit." Nor was there any finding Jordan was "psychologically disturbed" in any way.

A review of the circumstances of the robberies indicates that Jordan was an active participant, drawing his gun on the victims, physically searching Billings, removing his wallet and asking where the drugs were. Jordan also aimed his gun at Avila before Packer shot Avila, "[T]here was no evidence [Jordan] was an unusually immature youth and did not foresee the risk he was creating. By contrast, the final result was the natural and likely consequence of [Jordan's] assistance and facilitation of the underlying crime." (People v. Thompson (1994) 24 Cal.App.4th 299, 306.) Indeed, "robbery-murder represents 'a very high level' of danger to society, 'second only to deliberate and premeditated murder with malice aforethought.'" (People v. Young (1992) 11 Cal.App.4th 1299, 1309, quoting People v. Dillon, supra, 34 Cal.3d at p. 479.)

Moreover, the probation report described Jordan as a very dangerous" individual. Jordan had been previously convicted, as noted in the probation report, of the possession of a deadly weapon for which he was sentenced to two years in state prison, and convicted also of carrying a concealed weapon for which he was sentenced to a term of probation.

Nor is there any constitutional infirmity in Jordan's sentence when comparing it to that imposed on his codefendant, Packer. Packer received a sentence of 15 years to life on count 1, based on his conviction of only second degree murder (by a separate jury at the joint trial with Jordan). However, a comparison of punishments imposed on codefendants is not necessarily a determinative factor under Dillon. (Cf. People v. Howard (1988) 44 Cal.3d 375, 445-446; People v. Nelson (1987) 194 Cal.App.3d 77, 80; People v. Rousseau (1982) 129 Cal.App.3d 526, 537.)

Accordingly, examining this "'offense and/or the offender with particular regard to the degree of danger both presented to society'" (People v. Dillon, supra, 34 Cal.3d at p. 479, quoting In re Lynch (1972) 8 Cal.3d 410, 425), the court's sentence was not "'out of all proportion" (In re Lynch, supra, at p. 424; see also Solem v. Helm (1983) 463 U.S. 277, 288-292) so as to be unconstitutionally excessive either in the abstract or for this defendant.

III. The Trial Court's Excusal of Juror Ferguson Was With Good Cause

Contrary to Packer's contention, the trial court dil not abuse its discretion or deny him any constitutional rights in excusing Juror Ferguson and substituting an alternate. Pursuant to Penal Code section 1089, the court, upon good cause, may discharge any juror found unable to perform the duties of a juror at any time during the trial. (People v. Johnson, supra, 6 Cal.4th 1, 21; People v. Thomas (1994) 26 Cal.App.4th 1328, 1332-1333.) "The determination of 'good cause' rests in the sound discretion of the court [citations], and the court's finding thereof will be upheld if substantial evidence supports it [citation]." (People v. Johnson, supra, at p. 21.) "[A] juror's inability to perform as a juror must 'appear in the record as a demonstrable reality.'" (Ibid., quoting People v. Compton (1971) 6 Cal.3d 55, 60.)

The excusal of an impaneled juror for cause and replacement with an alternate juror do "not offend constitutional proscriptions." (People v. Burgess (1988) 206 Cal.App.3d 762, 766.) Substituting an alternate juror for one of the original jurors does not change the character of the jury (People v. Green (1971) 15 Cal.App.3d 524, 528), and "a defendant's right to a fair and impartial jury does not include the right to

have any particular individual sit as a juror in his case." (People v. Moore (1985) 166 Cal.App.3d 540, 548.)

When a juror affirms a willingness and ability to act impartially in weighing the evidence, the facts must clearly show the juror's bias to warrant the juror's removal. (People v. Earnest (1975) 53 Cal.App.3d 734, 749-750.) A juror's claim of impartiality may be outweighed by factors indicating that no "person similarly situated[ ] could render a fair and unbiased decision" (People v. Farris (1977) 66 Cal.App.3d 376, 386), despite the juror's assertion of impartiality.

In the present case, after the court was advised that someone in the district attorney's office had commented about the present case to Juror Ferguson, a clerical employee in the district attorney's office, the court held a hearing. Juror Ferguson revealed: "My supervisor said she'd be glad when it was over and -- what did she say? 'Just tell them they're guilty.'" After discussions with counsel, the court observed, "It's unbelievable that a supervisor in the district attorney's office would say such a thing to a juror. I intend to follow up on that." The court then brought Juror Ferguson back into the courtroom for further questioning.

Juror Ferguson confirmed that her supervisor had told her that the defendants were guilty. When the court asked how it affected her, the juror replied, "It doesn't [a]ffect me at all because of -- it's just a statement," but acknowledged, "It's difficult for me to be on this case knowing everybody down here, and it hasn't affected me at all." When the court inquired as to who in the courtroom had spoken to her, Juror Ferguson replied, "I mean, the attorneys, the cops, you know, they just say things to you. It doesn't mean anything, though, because I'm listening to the facts of the case." Specifically, police officers had "ask[ed] me what's going on and I won't comment." Juror Ferguson also indicated she had not reached a decision in the case, and affirmed that she could still be fair and impartial. She also stated spontaneously, "I don't think it will affect the decision that I come to at all."

Counsel for Packer indicated that he was aware of Juror Ferguson's employment when he passed her for cause and reminded the court that he also did not use a peremptory challenge. Counsel indicated that he had previously gotten the impression from her questionnaire and from her answers that she was honest and could be fair and impartial. Counsel did not feel Juror Ferguson had been tainted and asked the court not to

excuse her. However, the court concluded, "What bothers me most is the last comment she (made), that other people have talked to her. Now, she's obviously not telling me. I think she's covering up. The court is going to excuse her and the court will pick a new juror."

Although Juror Ferguson claimed she was still capable of being fair and impartial and asserted, "[I]t hasn't affected me at all," in the same breath she admitted, "It's difficult for me to be on this case knowing everybody down here . . . ." Juror Ferguson's supervisor in the district attorney's office told her she would be "glad when it was over," and told Juror Ferguson to "just tell them they're guilty." Juror Ferguson acknowledged it was "difficult" for her to be a juror on the case because the people she knew in the courthouse, meaning "the attorneys" and "the cops," were "say[ing] things" to her, despite the fact she refused to comment when they would ask "what's going on."

It is thus apparent that Juror Ferguson was subjected to fairly intense pressures from her employer, attorneys and law enforcement officers. She claimed she could still be fair and impartial. However, her admission that it was "difficult" for her to be a juror and the obvious pressure, particularly from her supervisor in the district attorney's office insisting that she find the defendants guilty, as well as her spontaneous and somewhat ambiguous remark that she did not "think it will affect [her] decision," provides demonstrable and substantial evidence to support the trial court's conclusion that the juror was not completely forthcoming in, as we deem it, her unrealistic assertion of the ability to be fair and impartial. Certainly if defense counsel had requested Juror Ferguson's removal, the court would not have abused its discretion in excusing her. Nor did the court in excusing this juror abuse its discretion simply because the prosecution made the request to remove the juror.

As Packer urges on appeal, quoting People v. Hernandez (1984) 160 Cal.App.3d 725, 748, and to the extent such principles apply in the present context, "it is the appearance of impropriety, the possibility of bias, that we guard against . . . . ¶ . . . Thus, in serving the dignitary interests of the individual it is not just fairness in fact that is a goal but also the individual's reasonable belief that the proceedings are fair."[2/]

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2. Packer complains that by excusing Juror Ferguson the court was "ridding the jury of one of its few black members." Although a juror's racial or ethnic background may explain why a defense attorney does not excuse for cause or with a peremptory challenge an employee of the district attorney's office, such a factor is of no consequence when assessing Juror Ferguson's ability to be a fair and impartial juror.

Accordingly, the trial court did not abuse its broad discretion in removing Juror Ferguson based upon substantial evidence at the hearing. (Cf. People v. Abbott (1956) 47 Cal.2d 362, 370-371 (good cause found to excuse juror who worked in the same office defendant's brother); People v. Taylor (1961) 189 Cal.App.2d 490, 494 (good cause found to excuse juror who worked with defendant's father periodically for 12 years and lived next-door to defendant's sister).)

IV. The Court's Comments to the Jury Were Not so Coercive as to Deny Packer a Fair and Impartial Jury or Due Process

At the end of deliberations on a Tuesday, after the jury had deliberated for several days for approximately 28 hours and returned verdicts on all but two counts,[3/] Juror Radcliff sent a note to the court requesting to be dismissed from the jury due to "health problems." The court spoke alone with her, deeming the situation "an emergency at this time."

Juror Radcliff explained that the seriousness of the charges left her unable to "make snap decisions," and that she was beginning to feel "a little burned out." The court reminded her that the jury was scheduled to have a day off the coming Thursday and asked if she could continue. When she agreed, the court thanked her and noted that if she were unable to complete her jury service, "They would have to start deliberations all over again with another person."

The next day, a Wednesday, Foreman Wyke gave a note to the court following the morning deliberations. The note indicated that "we can no longer deliberate," that Juror Radcliff "does not appear to be able to understand the rules as given by you," that "all my fellow jurors [are]

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3. We note that Packer was found not guilty of nine of the counts of which he was charged, i.e., two counts of forcible rape, two counts of oral copulation and five counts of first degree residential robbery.

questioning her ability to understand the rules and her ability to reason," and that continuing will result in a hung jury based on "one person[']s inability to reason." The court summoned both counsel and the jury.

Juror Wyke revealed to the court that the jury was having the same discussion over and over, with a disagreement over the rules of law. The court explained that disagreements were a part of the system, but that no juror had a right not to deliberate. The foreman opined that the jury had almost reached the "nondeliberating state."

When a different juror asked the court if it could possibly "clarify" the law, the court declined to do so. The foreman then indicated that the last vote had been 11 to 1, that he did not know if further deliberations would "do us any good," but that the hold-out juror was continuing to deliberate. The foreman agreed with the court that the upcoming day off might help.

The court again advised the jurors that it would not clarify the law, but that they "must accept and follow the law even though you disagree with it." The court did address one concern and clarified that there was nothing in the instructions about morals. The court then essentially followed defense counsel's suggestion to cut off further dialogue with the jurors and to tell them simply to follow the law as stated by the judge.

After a day off, deliberations resumed on a Friday. Juror Radcliff again wrote a note requesting to be relieved. Juror Radcliff indicated she had not known of the note written by the foreman until it was read in court and described the Wednesday hearing in court as a "public beating." Although she felt that "procedures have improved in their nature," she was nonetheless feeling "distress and disrespect from the other jurors." Over defense counsel's objection that Juror Radcliff was being singled out, the court decided to speak in chambers with her before deciding whether she was fit to continue.

In chambers, Juror Radcliff indicated she was "trying," but her efforts were not to the satisfaction of others. The court then spoke alone with Foreman Wyke in chambers. He indicated that all jurors were still deliberating and that following the holiday, the jurors attempted to resolve personality issues and then resumed substantive discussions of count 2 (the attempted murder of Avila).

Deliberations then resumed. The jurors were given the coming Monday off, so that another Juror could attend a training seminar. The

jury reconvened and deliberated for the entire day on Tuesday. On Wednesday morning, the jury returned its final verdict on count 1 (the murder of Berry).

The essence of Packer's complaints regarding the above scenario concern the court's statement that deliberations would have to begin anew if Juror Radcliff were excused and that the judge did not make numerous cautionary statements to the jury. Packer suggests that the court should have advised the jurors that they should consider Juror Radcliff's views, that neither she nor any of the other jurors need surrender their convictions, and that any of the remarks made by the court were not intended to suggest what verdict the court deemed appropriate. Packer further urges that the court should have clarified the law in response to the juror's inquiry and should have responded to Juror Radcliff's final request to speak with the court alone.

In People v. Gainer (1977) 19 Cal.3d 835, the court found improper an admonition that the case must at some time be decided. (Id. at p. 852.) Although, the court's indication to Juror Radcliff that deliberations would have to begin anew if she were excused injected an irrelevant factor (id. at p. 848), the remark did not impose the type of improper pressure on a juror who is advised that the case must at some time be decided. (Id. at pp. 851-852.) We acknowledge it may have been proper for the court to make the additional remarks suggested on appeal by Packer (see People v. Keenan (1988) 46 Cal.3d 478, 534), but the court was not required to do so.

Nor is there any reversible error in the court's failure to address further the jury's inquiry beyond clarifying that there was nothing in the instructions about morals. The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] [Nonetheless, t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for an information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citations.]" (People v. Hill (1992) 3 Cal.App.4th 16, 25, quoting People v. Beardslee (1991) 53 Cal.3d 68, 97.)

Moreover, there is nothing improper in urging the jury to consider

the matter further with the view to reaching an agreement (People v. Gainer, supra, 19 Cal.3d at p. 847, fn. 9), as long as the language used does not coerce a particular type of verdict. (People v. Carter (1968) 68 Cal.2d 810, 816-817.) Accordingly, the comments made and not made by the court to the jury did not coerce a particular verdict or deny Packer any constitutional rights.

V. Packer's Personal Absence From the Court's Conferences With Jurors Which Arose During Deliberations

Packer contends that he was denied his due process right to be present personally at trial because six conferences between the court and several of the jurors occurred in Packer's absence.[4] The first of the conferences was with Juror Ferguson, and after a hearing she was excused and replaced with an alternate. The next hearing was with Juror Schweda, during deliberations, when she related pressure by her employer to return to work, and the court resolved the matter by writing a letter to her employer. The third conference from which Packer was absent was the previously discussed session where Juror Radcliff requested to be excused for medical reasons. Thereafter, the court and counsel convened in chambers, first with Juror Radcliff, then with Foreman Wyke, and then again with Juror Schweda. The first two conferences concerned the deliberations process, and the last dealt with Schweda's delivery to the judge of a return letter from her supervisor, and an inquiry by her as to her rights as a juror.

Although a defendant has the right to be present at any communication between the judge and the jury (Shields v. United States (1927) 273 U.S. 583, 588-589), reversal of a conviction is not required merely because a defendant was not present during such a communication and did not waive his right to be present. Where a judge discusses merely "administrative" matters which have "no bearing on issues raised at trial," a defendant's absence is not prejudicial. (People v. Pride (1992) 3 Cal.4th 195, 263.) Specifically, discussions concerning

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4. Packer further complains that his defense counsel was not present during two of the juror conferences, constituting a violation of his constitutional right to counsel at all stages of the trial.

a juror's ability or inability to continue serving on the jury, even in the absence of defense counsel, are not prejudicial error. (People v. Wright (1990) 52 Cal.3d 367, 403.) Discussions concerning the possible discharge of a juror from service do not bear a reasonably substantial relationship to the fullness of the defendant's opportunity to defend his case. (People v. Abbott, supra, 47 Cal.2d at p. 372; see People v. Jackson (1980) 28 Cal.3d 264, 309-310.)

In the present case, all the conferences complained of either involved requests for relief from jury service on grounds of personal hardship, external employment-related problems, or the continuation of deliberations. All the incidents complained of thus had no reasonable, substantial relationship to any specific substantive legal issue or to Packer's ability to present a defense.

Packer complains that his absence from the conferences complained of deprived him of the ability to consult with counsel, bring unspecified factors to counsel's attention or give unspecified advice or suggestions to counsel. Packer further urges that his mere presence would have served the psychological function of keeping the jurors more honest and candid and ensuring their resolve. However, such speculation unfairly assumes certain inadequacies by defense counsel and the jurors, of which there is no evidence in the record. Accordingly, even assuming any error, it was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.)

VI. The Court's Order Requiring Packer to Wear a Concealed Leg Brace Did Not Deny Him Any Constitutional Rights

A defendant should not be subjected to "physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (People v. Duran (1976) 16 Cal.3d 282, 290-291, fn. omitted.) However, to minimize the likelihood of courtroom disruption, the trial court "is vested, upon a proper showing, with discretion to order the physical restraint most suitable for a particular defendant in view of the attendant circumstances. The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record . . . . (Id. at p. 291; see People v. Cox (1991) 53 Cal.3d 618, 651.)

A defendant's "nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained" (People v. Duran, supra, 16 Cal.3d at pp. 292-293, fn. 11) may justify the court's decision to apply restraints, which "cannot be successfully challenged on review except on a showing of a manifest abuse of discretion." (Id. at p. 293, fn. 12; see People v. Stankewitz (1990) 51 Cal.3d 72, 95.)

In the present case, the court held a hearing at which a deputy sheriff testified that Packer had a relationship with a leader of the Black Guerilla Family prison gang, and that the leader of the gang, Doc Holliday, was a high-security risk serving a sentence of life without the possibility of parole. The deputy further testified regarding information from another deputy in the security unit who relayed to him that the sheriff's special investigations bureau obtained information "that somebody connected with Holliday has said that when [Holliday] gets to L.A., that stuff is going to happen. [Holliday's] got nothing to lose. He wants out. He's a high escape risk." Another deputy sheriff provided information from an unknown source that Holliday's wife had communicated with Packer and said, "I'll see you in Los Angeles, and that that's when it's going to happen." In addition, Packer was "a leader of several Blood gang sets," and had caused "major disturbances," apparently involving one incident 10 years earlier which resulted in criminal charges of which he was acquitted. Regarding Packer's status in jail, there was a special handling card" on him, indicating "an inmate's possible potential problems of some sort."

The record at the hearing thus established Packer's potential for nonconforming future behavior, despite the hearsay nature of and unknown source of some of the information. The court thus acted within its discretion in minimizing the likelihood of courtroom disruption. The court need not wait for an escape or a violent tragedy to occur before ordering an appropriate physical restraint. The court's order was particularly appropriate in view of its finding that the "leg brace will not be visible to the jury; will not impede communications with [Packer's] lawyer; will not detract from the dignity or the decorum of the judicial proceeding; will not be painful to the defendant; and [the defendant] will be seated before the jury enters and remain seated until the jury leaves." Although after the trial Packer complained about the emotional

distraction and physical discomfort of the leg brace, it was a reasonable physical restraint warranted by the circumstances revealed at the hearing and not necessarily visible by the jury.

VII. Refusal to Grant Packer Cocounsel Status

Packer cites to a pretrial ruling by a previous judge approximately two and a half years prior to the start of trial and urges that the trial court violated his right meaningfully to participate and assist counsel when it revoked his cocounsel status.[5] The contention is without merit.

"A criminal accused has only two constitutional rights with respect to his legal representation,"and they are mutually exclusive. He may choose to be represented by professional counsel, or he may knowingly and intelligently elect to assume his own representation. [Citation.] An accused who chooses professional representation, rather than self-representation, has no right to participate as cocounsel. [Citations.]" (People v. Hamilton (1989) 48 Cal.3d 1142, 1162; see People v. Frierson (1991) 53 Cal.3d 730, 741.)

In the present case, the trial court properly denied cocounsel status for lack of a substantial showing of justification. (People v. Hamilton, supra, 48 Cal.3d at p. 1162.) Packer's defense counsel represented to the trial court that Packer wanted "pro. per." status not to enable to speak in court, but rather to allow him to continue to participate in the preparation of the trial "by doing research in the library and organizing materials." The court did not deem Packer as having had pro. per. status, but agreed to sign an order directing the sheriff's department to permit Packer to have access to the law library to assist in the preparation of the case. The court declined to include in the order any pro. per. status designation. As the court explained, "I want it clearly understood that he's not a pro per in this court . . . . [¶] . . . . I'm not going to order the sheriff's department to make him pro per, period." Since Packer had counsel who was presumably fully capable of performing library research and organizing

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5. The minute order in question, dated September 21, 1989, stated as follows: "Defendant's motion for co-counsel status is granted. Sheriff shall provide to defendant all privileges granted inmates with such status."

materials, the specified tasks in which Packer wanted to participate, and the court was willing to sign an order to give Packer access to the law library, the court properly exercised its discretion in denying him cocounsel status. (See People v. Bloom (1989) 48 Cal.3d 1194, 1219.)

VIII. Vicinage

Finally, Packer complains that by moving his trial from the Central District of Los Angeles, where the crimes occurred, to Van Nuys, he was denied the constitutional right to trial by a representative cross-section of jurors chosen from the vicinage.[6] However, the transfer of the case to Van Nuys was appropriate and the jury pool was randomly selected in accordance with lawful procedures.

Packer properly concedes that this issue has been resolved against him in Hernandez v. Municipal Court (1989) 49 Cal.3d 713, and merely raises the matter to preserve it for possible federal review. Any court in the county satisfies the geographic vicinage requirement (id. at p. 729), and Packer was tried in the county in which the crimes occurred. (See People v. Danielson (1992) 3 Cal.4th 691, 704.) To the extent that Packer challenges a denial of his right to a representative cross-section of jurors from the vicinage, he failed to challenge the composition of the jury panel by complying with written notice procedures (Code Civ. Proc., § 225), and has therefore waived the issue on appeal.

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6. After the case was transferred to Van Nuys, Packer's counsel verbally requested a panel chosen from the Central District or a combined panel from the Central District and the San Fernando Valley. After jury selection began, counsel again requested a panel from the Cental District, or alternatively requested a mistrial.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED.

[Signature]
BOREN, P.J.

We concur:

[Signature]
FUKUTO, J.

[Signature]
NOTT, J.